RECORD, CASE No. 13,131.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

TERM No., 124.

JOHN B. THOMPSON, JOHN P. CHINN, AND JAMES M. FORSYTHE, JR., PLAINTIFFS IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KENTUCKY.

FILED SEPTEMBER 27, 1888.

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INDEX.

	Original.	Print.
Caption	1	1
Transcript from district court	1	1
Petition	2	1
Exhibit B—Bond of Thompson *et al.* to United States	6	3
A—Bond of Thompson *et al.* to United States	10	5
Summons	14	7
Marshal's return	14	8
Answer	15	8
Order taking demurrer to answer under advisement	33	16
Demurrer to answer	34	17
Order on demurrer	35	17
Opinion on demurrer	35	17
Trial and verdict	52	24
Judgment	52	24
Bond	53	24
Clerk's certificate	54	26

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	Original.	Print.
Writ of error to district court	55	26
Citation	56	27
Assignment of errors	57	27
Judgment	62	30
Opinion	63	30
Bond	65	31
Clerk's certificate	66	32
Writ of error	67	32
Citation	69	33
Proof of service of citation	70	33
Assignment of errors	71	33

1 *Caption.*

Proceedings of the circuit court of the United States for the district of Kentucky at a regular term begun & held at the Federal court hall, in the city of Louisville, on Monday, October 3rd, 1887.

Present: Hon. Howell E. Jackson, judge of circuit court of the United States for the 6th circuit.

JOHN B. THOMPSON, JOHN P. CHINN, & JAMES M. FORSYTHE, JR.,
vs.
THE UNITED STATES OF AMERICA.

Be it remembered that heretofore, to wit, on the 3rd day of October, 1887, came the plaintiffs, by their attorney, and filed a transcript of the record of the district court in this case; which transcript is as follows:

Transcript of Dist. Court.

Proceedings of the district court of the United States for the district of Kentucky at regular term of our said court begun at Louisville on Monday, February 21st, 1887.

Present: The Hon. John W. Barr, judge of the United States for the district of Kentucky.

UNITED STATES
vs.
JOHN B. THOMPSON, JOHN P. CHINN, & JAMES M. FOR-
2 SYTHE, JR.

Be it remembered that heretofore, to wit, on the 29th day of January, 1886, came the district attorney and filed in the clerk's office of said court his petition against the above-named defendants; which petition is as follows:

Petition.

District Court of the United States, Sixth Circuit, and District of Kentucky.

THE UNITED STATES OF AMERICA, Plaintiff,
vs.
JOHN B. THOMPSON, JOHN P. CHINN, & JAMES M. FORSYTHE, JR., Defendants. } Petition.

The plaintiff, The United States of America, state- that heretofore, to wit, on the 23rd of October, 1885, the defendant-, John B. Thompson, John P. Chinn, and James M. Forsythe, Jr., made, signed, sealed, and delivered to plaintiff a certain writing obligatory, now here to the court shown, the date whereof is the day and year aforesaid, and which is, in substance, as follows:

Know all men by these presents that we, John B. Thompson, as principal, and John P. Chinn and James M. Forsythe, Jr., as sureties, are held and firmly bound unto the United States of America in the just and full sum of forty-one thousand dollars; for the payment of which sum we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated at Harrodsburg this 23rd
3 day of October, 1885.

Whereas on the 8th day of April, 1885, John B. Thompson, as principal, and John P. Chinn and James M. Forsythe, Jr., as sureties, gave a certain bond conditioned for the delivery of certain distilled spirits therein named on board ship at the port of Newport News, Va., for exportation to Melbourne, Australia, and for the performance of certain other acts therein named, all of which will more clearly appear by a reference to said bond, a copy of which is hereto annexed marked (A); and whereas it is now found desirable to deliver a portion of said spirits on board ship at the port of New York for exportation, namely: No. of packages, 929, Bourbon whisky; marks and serial No. of packages, 7738—8000, 8021—8044, 8074—8202, 8359—8649, 8651—8818, 8820—8873; No. of warehouse stamps, $6646\frac{138}{400}$, $6890\frac{421}{444}$, $6890\frac{474}{602}$, $6890\frac{954}{1049}$, $6891\frac{1051}{1218}$, $6891\frac{1220}{1293}$; wine gallons, $43,157\frac{1}{2}$; proof gallons, 42,415.74; taxable gallons, 43,369; amount of tax, $39,032.10, by the S. W. R. R., C. N. O. and T. P. R. R., C. H. & D. N. Y. P. O. and N. Y., L. E. & W. to New York, from distillery warehouse No. 63, in the 8th dist. of the State aforesaid: Now, therefore, the conditions of this obligation is such that if the whole of the aforesaid merchandise shall be safely delivered to the collector of customs at the said port of New York within fifteen days from date hereof, and if the said John B. Thompson, principal, shall export or cause to be exported the said merchandise in accordance with the internal revenue
4 laws and the regulations of the Treasury Department made in pursuance thereof immediately on the arrival of said merchandise at said port of New York, and shall within fifteen days thereafter produce to the collector of internal revenue for the 8th district of the State of Kentucky the certificate of the collector of customs of the said port of New York *harving* that the said merchandise has been duly exported, and shall also produce within nine months thereafter his certificate that the said merchandise has been duly landed at the port of Bremen or at some other port without the jurisdiction of the United States, or shall produce satisfactory proof of the loss thereof at sea without fault or neglect of the owner or shipper thereof as required by law and regulations, then this obligation to be void; otherwise to be and remain in full force and virtue.

JOHN B. THOMPSON.
JOHN P. CHINN.
JAMES M. FORSYTHE, JR.

The bond executed on the 8th day of April, 1885, referred to in the above is filed herewith as part hereof, marked (B); nevertheless

plaintiff says that said defendants have not well and truly kept, observed, and complied with the conditions and requirements of said writing obligatory, but have broken and violated the same in the following respects: The said defendants failed to deliver to the collector of customs at New York within fifteen days or within
5 any other time (1,065) one thousand and sixty-five gallons of said merchandise, as they have undertaken, agreed, and promised to do, as will more fully appear from a regauge made on the 27th day of Oct., 1885, by Morris Yeiser, a duly authorized officer in the service of the United States Internal Revenue Department, a duly certified copy of which is filed herewith as part hereof, marked (C). Plaintiff further avers that there was by law a tax of (90c.) ninety cents per gallon imposed upon each and every gallon of said one thousand and sixty-five gallons of distilled spirits when manufactured and placed in the bonded warehouse at defendants' distillery, # 63, in the 8th internal revenue district of Kentucky, which has not been paid by said defendants nor any one of them, nor has the said 1,065 gallons of distilled spirits been delivered to the collector of customs at New York as defendants agreed and cantrac-ed, whereby said tax accrued and became due to plaintiff, and defendants are indebted to plaintiff in the sum of nine hundred and fifty-eight dollars and fifty cents as a tax upon the said one thousand and sixty-five gallons of distilled spirits removed by said defendants from the bonded warehouse on the distillery premises aforesaid, the sum never having been paid. Plaintiff further avers that T. S. Bronston, as collector of internal revenue in the 8th collection district
6 of Kentucky, on the — day of ——, demanded payment of the defendants of the said $958.50, but the defendants have failed and refused to pay the same; whereby the same has become due plaintiff, with interest at the rate of one per cent. per month from the — day of ——, together with a penalty of five per centum, all of which is due and wholly unpaid; wherefore plaintiff asks judgment against the defendant- for the sum of nine hundred and fifty-eight dollars and fifty cents, with interest at the rate of one per cent. per month from the — day of —— until paid, together with a penalty of five per cent. upon the same, and for all proper relief.

J. C. WICKLIFFE,
U. S. Attorney.

The Exhibit "B" referred to in the petition is as follows:

EXHIBIT "B."

Know all men by these presents that we, John B. Thompson, as principal, and John P. Chinn and James M. Forsythe, Jr., as sureties, are held and firmly bound unto the United States of America in the just and full sum of forty-one thousand dollars; for the payment of which sum we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated at Harrodsburg, this 23rd day of October, 1885.

7 Whereas on the 8th day of April, 1885, John B. Thompson as principal, and John P. Chinn and James M. Forsythe, Jr., as sureties, gave a certain bond conditioned for the delivery of certain distilled spirits therein named on board ship at the port of Newport News, Va., for exportation to Melbourne, Australia, and for the performance of certain other acts therein named, all of which will more clearly appear by a reference to said bond, a copy of which is hereto annexed, marked "A;" and whereas it is now found desirable to deliver a portion of said spirits on board ship at the port of New York for exportation — Bremen, namely: No. of packages, 929, Bourbon whisky; marks and serial numbers of packages, $\frac{7738}{8000}$, $\frac{8021}{8044}$, $\frac{8074}{8202}$, $\frac{8359}{8649}$, $\frac{8651}{8818}$, $\frac{8820}{8873}$; Nos. of warehouse stamps, $6646\frac{138}{400}$, $6890\frac{421}{444}$, $6890\frac{474}{602}$, $6890\frac{959}{1049}$, $6891\frac{1051}{1218}$, $6891\frac{1220}{1273}$; wine gallons, $43{,}156\frac{1}{2}$; proof gallons, 42,415.74; taxable gallons, 43,369; amount of tax, $39,032.10, by the S. W. R. R., C., N. O. & T. P. R. R., C. H. & D. N. Y. P. O. and N. Y., L. E. & W. to New York, from distillery warehouse No. 63, in the 8th district of the State aforesaid: Now, therefore, the condition of this obligation is such that if the whole of the aforesaid merchandise shall be safely delivered to the collector of customs at the said port of New York within fifteen days from date hereof, and if the said John B. Thompson, principal, shall export or cause to be exported the said merchandise in accordance with the internal revenue laws and

8 the regulations of the Treasure Department made in pursuance thereof immediately on the arrival of said merchandise at said port of New York, and shall within fifteen days thereafter produce to the collector of internal revenue for the 8th district of the State of Kentucky the certificate of the collector of customs of the said port of New York showing that the said merchandise has been duly exported, and shall also produce within nine months thereafter his certificate that the said merchandise has been duly landed at the port of Bremen or at some other port without the jurisdiction of the United States, or shall produce satisfactory proof of the loss thereof at sea without fault or neglect of the owner or shipper thereof as required by law and regulations, then this obligation to be void; otherwise to be and remain in full force and virtue.

JOHN B. THOMPSON.
JOHN P. CHINN.
JAMES M. FORSYTHE, JR.

Sealed and delivered in the presence of—

PHIL. B. THOMPSON, SR.
BEN. F. ROACH.

STATE OF KENTUCKY, } *ss:*
8th District, }

I hereby certify that on this 23rd day of Oct., one thousand eigh hundred and eighty-five, before me personally came John B Thompson, John P. Chinn, and James M. Forsythe, Jr., known to

me to be the individuals described in and who executed the
9 within bond, and severally acknowledged that they executed the same.

P. E. BELL,
N. P., M. C., K'y. [SEAL.]

STATE OF KENTUCKY, } ss:
County of Mercer, }

John P. Chinn, one of the sureties in the within bond, being duly sworn, says he is a resident of Harrodsburg, in the State of Kentucky; that he still owns the personal property and real estate described in his affidavit on form 33 or 33*a*, dated Jan. 19th, 1885, which has been deposited in the collector's office of the 8th district of Kentucky, and a duplicate forwarded to the office of internal revenue at Washington, D. C., and is worth twenty thousand dollars over and above all debts, dues, demands, liabilities, and incumbrance whatever against him, besides property exempt by law from execution.

JOHN P. CHINN.

Sworn to before me this 23rd day of Oct., 1885.
[SEAL.]

P. E. BELL,
N. P., M. C., Ky.

STATE OF KENTUCKY, } ss:
County of Mercer, }

James M. Forsythe, Jr., one of the sureties in the within bond, being duly sworn, says he is a resident of Harrodsburg, in the State of Kentucky; that he still owns the personal property and real estate described in his affidavit on form 33 or 33*a*, dated Jan. 19th, 1885, which has been deposited in the collector's office of the 8th district of Kentucky, and a duplicate forwarded to the office
10 of internal revenue at Washington, D. C., and is worth sixty thousand dollars over and above all debts, dues, demands, liabilities, and incumbrances whatever against him, besides the property exempt by law from execution.

JAMES M. FORSYTHE.

Sworn to before me this 23rd day of October, 1885.

P. E. BELL,
N. P., M. C., Ky. [SEAL.]

The above bond is approved by me, the same being executed in due form and the sureties therein being satisfactory to me.
27th day of October, 1885.
[SEAL.]

T. S. BRONSTON, *Collector.*

Bond "A" above referred to is as follows, to wit:

Know all men by these presents that we, John B. Thompson, of Harrodsburg, Mercer county, Ky., as principal, and James M. Forsythe, Jr., & John P. Chinn, as sureties, are held and firmly bound

unto the United States of America in the just and full sum of forty-one thousand dollars; for the payment of which sum we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seal and dated at Harrodsburg-, Ky., this 8th day of April, 1885.

Whereas the above-bounden John B. Thompson, principal, has made request to W. J. Landram, Esq., collector of the 8th district of the State of Kentucky, for the transportation of the following-described spirits to the port of Newport News for exportation to—,

11 viz.: No. of packages & kind of spirits, 1,085 bourbon whisky; marks and serial numbers of packages, $\frac{7738}{8000}$, $\frac{8021}{8044}$, $\frac{8074}{8356}$, $\frac{8359}{8873}$; nombers of warehouse stamps, $6646\frac{138}{400}$, $6890\frac{421}{444}$, $6890\frac{474}{706}$, $6890\frac{759}{1273}$; wine gallons, $50{,}425\frac{1}{2}$; proof gallons, 50,927.15; taxable gallons, 50,686; amount of tax, $45,619.40, by Southwestern R. R. to Harrodsburg Junction; thence C., N. O. & T. P. R. R. to Lexington, Ky.; thence C. & O. R. R. to Newport News, from distillery warehouse No. 63, owned by John B. Thompson, at Harrodsburg, in the eight- district and State aforesaid: Now, therefore, the condition of this obligation is such that if the whole of the aforesaid merchandise shall be safely delivered to the collector of customs at the said port of Newport News within seven months from the date hereof, and if the said John B. Thompson, principal, shall export or cause to be exported the said merchandise in accordance with the internal revenue laws and the regulations of the Treasury Department made in pursuance thereof immediately on the arrival of the said merchandise at the said port of Newport News, and shall within fifteen days thereafter produce to the collector of internal revenue for the 8th district of the State of Kentucky the certificate of the collector of customs of the said port of Newport News showing that the said merchandise has been duly exported, and shall also produce within eighteen months thereafter his certificate that the said

12 merchandise has been duly landed at the port of Melbourne, Australia, or at some other port without the jurisdiction of the United States, or shall produce satisfactory proof of the loss thereof at sea without fault or neglect of the owner or shipper thereof as required by law and regulations, then this obligation to be void; otherwise to remain in full force and virtue.

JOHN B. THOMPSON. [SEAL.]
JOHN P. CHINN. [SEAL.]
JAMES M. FORSYTHE, JR. [SEAL.]

Signed, sealed, and delivered in the presence of—
P. B. THOMPSON, SR.
B. F. ROACH.

STATE OF KENTUCKY, *8th District*, } ss:

I hereby certify that on this 8th day of April, one thousand eight hundred and eighty-five, before me personally came John B. Thompson, James M. Forsythe, Jr., and John P. Chinn, known to me to be

the individuals described in and who executed the within bond and severally acknowledged that they executed the same.

P. E. BELL,
N. P., M. C., Ky.

STATE OF KENTUCKY, }
County of Mercer, } *ss:*

James M. Forsythe, Jr., one of the sureties in the within bond, being duly sworn, says he is a resident of Harrodsburg, in the State of Kentucky; that he still owns the personal property and real estate described in his affidavit on form 33 or 33*a*, dated
13 Jan. 19th, A. D. 1885, which has been deposited in the collector's office of the eight- district of Kentucky and a duplicate forwarded to the office of internal revenue at Washington, D. C., and is worth sixty thousand dollars over and above all debts, dues, demands, liabilities, and incumbrances whatever against him, besides property exempt by law from execution.

Sworn before me this 8th day of April, 1885.

P. E. BELL,
N. P., M. C., Ky.

STATE OF KENTUCKY, }
County of Mercer, } *ss:*

John P. Chinn, one of the sureties in the within bond, being duly sworn, says he is a resident of Harrodsburg, in the State of Kentucky; that he stills owns the personal property and real estate described in his affidavit on form 33 (or 33*a*), dated Jan. 19th, 1885, which has been deposited in the collector's office of the eighth district of Kentucky and a duplicate forwarded to the office of internal revenue at Washington, D. C., and is worth twenty thousand dollars over and above all debts, dues, demands, liabilities, and incumbrances whatever against him, besides property exempt by law from execution.

Sworn before me this 8th day of April, 1885.

P. E. BELL,
N. P., M. C., Ky.

The within bond is approved by me, the same being executed in due form and the sureties thereon being satisfactory to me.
14 9th day of April, 1885.

W. J. LANDRUM, *Collector.*

Upon which petition there issued the following process, to wit:

Summons.

The President of the United States of America to the marshal of the Kentucky district, Greeting:

You are commanded to summons John B. Thompson, John P. Chinn, James M. Forsythe, Jr., to answer, on the first day of the

next February term of the district court of the United States for the district of Kentucky, to be held at the city of Louisville, a petition filed against them in said court by the United States of America, and warn them that upon their failure to answer the petition will be taken for confessed or they will be proceeded against for contempt; and you will make due return of this summons on the first day of the next term of said court.

Witness the Honorable John W. Barr, judge of the district court of the United States, at Louisville, in the said district, this 29th day of Jan., in the year of our Lord 1886, and of our Independence the 110.

[SEAL.] SAM'L B. CRAIL, *C. D. C. K. D.*,
By HENRY F. CASSIN, *Deputy.*

Upon which process the marshal made the following return, to wit:

Marshal's Return.

I hereby appoint Fred. De Haven a special bailiff to execute the within summons.

A. J. GROSS, *U. S. M.*

Executed January 30th, 1886, on John P. Chinn and John B.
15 Thompson, in Harrodsburg, Ky., by delivering to each of them a true copy of the within summons.

A. J. GROSS, *U. S. M.*,
By FRED. DE HAVEN, *S. B.*

And at a term of our said court held for its February term, 1886, to wit, on Monday, February 22nd, 1886, came the defendant John B. Thompson in proper person and filed his answer herein; which is as follows:

Answer.

District Court of the United States, Six- Circuit & District of Kentucky.

THE UNITED STATES OF AMERICA, Plaintiff,
vs.
JOHN B. THOMPSON, JOHN P. CHINN, & JAMES M. FORSYTHE, Jr., Defendant.
} Answer of the Defendant Jno. B. Thompson.

The defendant J. B. Thompson, for answer to plaintiff's petition herein, states that it is not true and he denies that he is indebted to the plaintiff in the sum of nine hundred & fifty-eight & $\frac{50}{100}$ dollars or any other sum as a tax upon the one thousand and sixty-five gallons of distilled spirits mentioned in the petition or on any other spirits; he denies that said spirits or any part of them were removed from his bonded warehouse by him or any one else. *Plaintiff* denies that on the — day of —— or at any other time T. S. Bronston, as

collector of the 8th collection district of Ky., demanded of the
16 defendants or any of them payment of said nine hundred & fifty-eight & $\frac{50}{100}$ dollars or any part of it.

Paragraph 2. The *plaintiff* Jno. B. Thompson, further answering, states that he is a distiller by occupation, engaged in the manufacture of distilled spirits from grain, in the 8th district of Ky., for the purposes of domestic and foreign trade; that, desiring to export a portion of his product, to wit, serial numbers $\frac{7738}{8000}$, $\frac{8021}{8044}$, $\frac{8074}{8356}$, $\frac{8359}{8873}$, containing 50,425½ wine gallons, 50,927.15 proof gallons, 50,686 taxable gallons, he executed and delivered to the plaintiff the bond dated April 8th, 1885, referred to in and filed with plaintiff's petition, and covering the spirits afterwards embraced in the bond herein sued on; that after the execution of said first bond, certain circumstances having occurred, which are hereinafter more fully set out, by reason of which it was rendered necessary that the route of the spirits should be changed from Newport News to New York as a port of export, and from Melbourne, Australia, to Bremen, Germany, as the point of destination, the second bond was given in compliance with certain rules and regulations of the plaintiff's Treasury Department requiring the same; that by the terms and stipulations of the aforesaid bond dated April 8th, 1885, the defendant was allowed the period of seven months from the date of the bond in which to deliver the same to the collector at the port of
17 export and fifteen days additional thereto to deliver them aboard the vessel. Defendant avers that at the time of the execution and delivery of the bond of April 8th, 1885, the spirits upon which the taxes are herein sued for were in the packages embraced in said bond, as shown by the gauger's inspection and return, which is in the possession of the plaintiff. The defendant charges that by the execution and acceptance of said last-named bond the said goods were freed from any obligation for the payment of any tax to the plaintiff and were in due process of exportation on and after the said 8th day of April, 1885, and which has been successfully accomplished and perfected by the landing of the aforesaid spirits at Bremen, Germany, a port outside the jurisdiction of the United States; that said distilled spirits on the 8th day of April, 1885, the date of the execution and acceptance of said bond, were withdrawn from defendant's distillery warehouse, were properly branded, stamped, and cut as required by the regulations of the Treasury Department for the purpose of designating and separating them from all other distilled spirits upon which a domestic tax of 90 cents per gallon might be imposed and to show that they were a different class or object, viz., export spirits, upon which no tax is due or could be collected by the plaintiff.

18 Defandant charges that the tax herein sued for is a deficiency tax upon that part of the aforesaid spirits embraced in the bond of October 23rd, 1885, which was actually exported, and grows out of the alleged difference found between the gauge made March, 1885, at the distillery warehouse at the time of entering same for export and that of the custom gauge at the port of export. Defandant says that it is provided by article 1, section 9, sub-section 5,

of the Constitution of the United States, plaintiff herein, that "no tax or duty shall be laid on any articles exported from any State;" that the tax herein claimed is a deficiency tax attempted to be collected, and if due at all was a lien upon the distilled spirits embraced in the bond sued on by the plaintiff, which the defendant, a citizen of Kentucky, has entered for export and has exported to Bremen, Germany, a country outside the jurisdiction of the United States; that any statute of Congress or any rule or regulation of the Treasury Department which has for its object the levy or collection of the tax herein sued for or any like tax is contrary to said clause of the Constitution and null and void, the same being a direct tax upon distilled spirits actually exported; wherefore defendant prays to be dismissed with cost-, &c.

Paragraph 3. Further answering, the defendant J. B. Thompson states that, desiring to export the distilled spirits specifically
19 set out in paragraph 2 of this answer, of which the one thousand & sixty-five gallons formed a part, that it was required by the plaintiff to execute and — did execute to the plaintiff the bond of April 8th, 1885, which bond was duly accepted by the plaintiff. He avers that prior to the execution and acceptance of said — and as condition precedent thereto he was required, in compliance with the rules and regulations of the Treasury Department of plaintiff, to make and did make with the plaintiff a full, fair, and complete settlement of all dues and taxes due to the plaintiff by reason of the manufacture of said spirits or any part thereof, and did settle, discharge, and pay to the plaintiff all deficiency taxes due thereon. In said settlement all taxes not directly paid by the defendant were abated by the plaintiff or allowed as a credit for exportation. Wherefore *plaintiff* pleads the execution and acceptance of said bond and said settlement in full accord and satisfaction of all taxes, dues, & demands of the plaintiff to said time on said spirits on account of the manufacture or production of same; wherefore he asks to be dismissed, &c.

Paragraph 4. The defendant J. B. Thompson, further answering, says that on the 8th day of April, 1885, after having made
20 the settlement as charged in the foregoing paragraph he entered the whisky embraced in the bond herein described for exportation to Melbourne, Australia, and duly executed the bond, form B, required by the rules and regulations of the statutes and Treasury Department for the purpose of freeing the distilled spirits therein contained from any and all obligations for a domestic tax and for the purpose of protecting the plaintiff from any frauds on its revenues during the period of exportation and by reason thereof, which bond was duly accep-ed by the plaintiff and constituted the basis of a contract bet-een plaintiff and this defendant as to the time, made, and manner of the performance of the act contracted about, and the liability of defendant to the plaintiff for any failure on his part to perform the same. Said bond is in words and figures as follows, vis:

Know all men by these presents that we, John B. Thompson, of

Harrodsburg, Mercer county, Kentucky, as principal, and James M. Forsythe, Jr., of Harrodsburg, Ky., and John P. Chinn, of Harrodsburg, Ky., as sureties, are held and firmly bound unto the United States of America in the just and full sum of forty-one thousand dollars; for the payment of which sum we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated at Harrodsburg, Ky., this 8th day of April, 1885.

21 Whereas the above-bounded John B. Thompson, principal, has made request to W. J. Landrum, Esq., collector of the 8th district of the State of Kentucky, for the transportation of the following-described spirits to the port of Newport News for exportation to Melbourne, Australia, viz: No. of packages and kind of spirits, 1,085 Bourbon whisky; marks and serial nombers of packages, $\frac{7738}{8000}$, $\frac{8021}{8044}$, $\frac{8074}{8356}$, $\frac{8359}{8873}$; nombers of warehouse stamps, $6646\frac{138}{400}$, $6890\frac{421}{444}$, $6890\frac{474}{756}$, $6890\frac{756}{873}$; wine gallons, $50{,}425\frac{1}{2}$; proof gallons, 50,927.15; taxable gallons, 50,686; amount of tax, $45,619.40, by Southwestern R. R. to Harrodsburg Junction; thence C., N. O. & T. P. R. R. to Lexington; thence C. & O. R. R. to Newport News, Va., from distillery warehouse No. 63, owned by John B. Thompson, at Harrodsburg, Ky., in the 8th district of the State aforesaid: Now, therefore, the condition of this obligation is such that if the whole of the aforesaid merchandise shall be safely delivered to the collector of customs at the said port of Newport News within seven months from the date hereof, and if the said John B. Thompson, principal, shall export or cause to be exported the said merchandise in accordance with the internal revenue laws and the regulations of the Treasury Department made in pursuance thereof immediately on the arrival of said merchandise at said port of Newport News, Va., and shall within fifteen days thereafter produce to the

22 collector of internal revenue for the 8th district of the State of Kentucky the certificate of the collector of customs of the said port of Newport News, Va., showing that the said merchandise has been duly exported, and shall also produce within eighteen months thereafter his certificate that the said merchandise has been duly landed at the port of Melbourne, Australia, or at some other port without the jurisdiction of the United States, or shall produce satisfactory proof of the loss thereof at sea without fault or neglect of the owner or shipper thereof as required by law and regulations, then this obligation to be void; otherwise to be and remain in full force and virtue.

JOHN B. THOMPSON. [SEAL.]
JOHN P. CHINN. [SEAL.]
JAMES M. FORSYTHE, JR. [SEAL.]

Signed, sealed, and delivered in the presence of—
P. B. THOMPSON, SR.
B. F. ROACH.

STATE OF KENTUCKY, }
County of Mercer, } *ss:*

I hereby certify that on this 8th day of April, one thousand eight hundred and eighty-five, before me personally came John B. Thompson, John P. Chinn, & James M. Forsythe, known to me to be the individuals described in and who executed the within bond, and severally acknowledged that the- executed the same.

P. E. BELL, *N. P., M. C.* [SEAL.]

Defendant states that prior to the execution and acceptance of said bond he had paid the deficiency taxes ascertained by the
23 regauge thereof due to plaintiff and had also paid ten cents per package for export stamp, which had been duly affixed thereon, and had also affixed the proper brands on each package, showing the port from which they were to be exported, as required by the regulations, and the collector of the district in which said spirits were stored had issued his permit directing the U. S. storekeeper in charge of same to deliver said spirits to defendant for exportation; that defendant had done each and every act necessary and proper to be done by him for the purpose of freeing them from the obligation of a domestic tax, and that said goods were no longer liable to a domestic tax of any kind. Defendant says that by the terms and conditions of his above bond he stipulated for the exportation of said distilled spirits and agreed to deliver them at Melbourne, Australia, and return the certificate of their landing abroad at the port named or some other port outside the jurisdiction of the United States within twenty-five months and fifteen days from the date of said bond. Defendant avers that the substance of said bond and acts guaranteed to be done thereby was the exportation of said spirits to the port named therein or some other port outside the jurisdiction of the United States — the time aboved named unless further time should be granted *at* authorized by the regulations of the Treasure Department; that expor-ation, the
24 thing contracted to be done by defendant, is one act consisting of many details, including the transportation of the spirits from the distillery warehouse to the port of export and delivery to the collector, the transport to the vessel and loading thereon, the transport to the foreign port outside of the jurisdiction of the United States and landing there, when the act contracted to be done would be complete and the evidence thereof returned to the collector of the 8th district of Ky. Defendant says that in pursuance of this contract made with the plaintiff he in good faith made contracts with other parties for the purpose of executing the same in good faith and within the time limited by the contract for the performance of the act agreed and contrac-ed to be done; that the period of four months was ample time for the plaintiff to have landed the spirits at St. Johns, Bermuda, a port outside the jurisdiction of the United States, and to return the certificate of landing to the collector of the 8th district of Ky., which would have been a performance of his contract, so far as the plaintiff is concerned; and this defendant, being the owner of his own warehouse, in this State, in

which said distilled spirits could have been stored free of charge, could have saved nearly ten thousand dollars, the cost of foreign storage for the 12 months, which was denied him by the en-
25 forcement of certain rules and regulations which were made by the Commissioner of Internal Revenue and the Secretary of the Treasury without warrant or authority of law and which are hereinafter set out.

The defendant says that after the execution and acceptance of the bond aforesaid the said Commissioner of Internal Revenue and Secretary of the Treasury, by certain rules and regulations made and approved May 26th, 1885, and the — day of August, 1885, and which were made without authority of law and in violation of this defendant's contract with the plaintiff, ordered and directed the assessment and distraint, seizure and sale of all the spirits embraced in said bond for a failure on the part of the defendant to deliver the same to the collector of customes at the port of export within seven months prescribed by said bond, and further declared that this defendant by such failure forfeit*her* all right after said time to further proceed to the exportation of said spirits, and notified this defendant that if said spirits were not delivered to said collector within the said time that said spirits should be seized and sold; and this defendant notified plaintiff at the time that his contracts made for the purpose of exporting said spirits in good faith stipulated for the delivery of said spirits at said port after the experation of said seven months, but in ample time to comply with the conditions of said bond by exporting said goods to a port without the
26 jurisdiction of the United States and returning the evidence thereof to the collector of the 8th district of Kentucky within the time limited by said bond; and defendant says that said contracts for the exportations of said spirits not stipulating for the delivery of said spirits to the collector of the port of Newport News within seven months from the date of said bond, in order to affect the transportation abroad as contemplated, that this defendant was compelled to make new contracts relative to their exportation for a compliance with the new regulations, and in making said contracts he found it impossible to transport the same from the port of Newport News in the time limited by said regulations. He avers that on account — same and on account of the regulations aforesaid he had to change the route to port of New York, and the destination of the goods to Bremen and Germany. Defendant says that in order to make this change he proffered to obtain the consent of the securities on his original bond to the said change of route and destination, and which he was able to do, and which was refused by the plaintiff, the plaintiff demanding and requiring, against his earnest protest, that he should execute the bond herein sued on with other & different stipulations & conditions from those embraced in the original bond and less favorable to this defendant;
27 that said rules and regulations, if the plaintiff had the authority to make the same, which is denied, were made for the purpose and with the view of annulling defendant's original contract with plaintiff after the same had been duly executed and

delivered by the defendant and accep-ed by the plaintiff and for the purpose of impairing the obligation of the original contract of plaintiff with defendant by depriving him illegally and wrongfully of certain rights obtained thereunder, valuable to him, and forcing him by enactment of heavy penalties to execute and deliver the bond herein sued on — abandon his right to export the distilled spirits embraced in said —. Wherefore he pleads that the execution and delivery of said bond was obtained from defendant by the plaintiff by force and duress, and that the same was not voluntarily given, and is null and void. Wherefore, &c.

Paragraph 5. Repeating the allegations of the former paragraph as fully as though copied herein and further answering, defendant say- that article 1, section 9, subsection 5, of the Constitution of the United States, which provides that no tax or other duty shall be laid on any article exported from any State, provided no time or limitation in which the act of exportation -hall be done; that section 3330 Revised Statutes of the United States, which
28 provides for the exportation of distilled spirits without the payment of the tax in pursuance of the aforesaid provision of the Constitution, provides no time or limit in which the act of exportation shall be done. Defendant avers that after distilled spirits or any other article has been duly entered for export and separated from other articles by being branded and stamped and otherwise designated that no tax of any kind can be laid thereon; that the plaintiff has the right to take the possession, the care, custody, and control of such spirits for the purpose of preventing fraud upon its revenue, but has no right to prescribe a limit or time. Defendant avers that time is not essential, the said plaintiff having in its possession, custody, and control the distilled spirits to be exported, and, further, that the Secretary of the Treasury and Commissioner of Internal Revenue, under and by virtue of the statutes conferring upon them certain powers, have no authority or power to enact a rule or regulation of limitations for the purpose of limiting the time in which the citizen has the privilege of exercising his constitutional right of exportation; that, having made certain rules and regulations for that purpose, viz., by prescribing a condition in the bond requiring the delivery of the distilled spirits to the collector
29 of the port of export within 30 days from the execution and delivery of the bond, and having further prescribed the said bond itself shall be executed and delivered within three years from the date of bonding of the distilled spirits and prescribed heavy pains and penalties for a failure on the part of defendant to comply therewith, the said bonds herein executed were delivered in compliance therewith, and were not voluntarily executed and delivered by the defendant, he claiming all the time he had the right to any time without limit to export the spirits embraced in said bond. Wherefore he pleads that said bonds were executed by force and duress, and are illegal, null, and void; wherefore, &c.

Paragraph 6. The defendant, further answering, and repeating all the allegations of his fourth paragraph herein, states that the plaintiff having voluntarily and without reservation extended the

time from thirty days to seven months for the transportation of the distilled spirits from the bonded warehouse to the port of export, the said plaintiff at the time knowing that said seven months certain losses would occur by reason of leakage and natural evaporation, and that after said goods were bonded for export they were free from the obligation of a domestic tax, the said plaintiff has no right now to undertake to collect a tax for said leakage and
30 evaporation, and the defendant avers that the tax herein sought to be collected is on distilled spirits which leaked and evaporated during the seven months above named. Wharefore he asks to be dismissed, &c.

Paragraph 7. Further answering, defendant says that said Commissioner of Internal Revenue and Secretary of the Treasury, by certain rules and regulations adopted by them Jan'y 31st, 1881, series 7, No. 4, article 53, page 29, provides that no assessment should be made for the deficiency tax herein sued for until this defendant had been first served for ten days with notice and gauger's certificate of the deficiency reported, stating in detail the packages, with their serial numbers and the quantity lost from each.

Defendant avers that before the institution of the suit herein and the asessment of the tax herein sued for against him that the said collector of the 8th collection district of Ky. nor any one else had ever furnished to him said papers, as required by said article. Wherefore, &c.

Paragraph 8. The defendant says that article 1st, section 8, subsection 1, of the Constitution of the United States, among other things, provides that all duties, imports, and exercises shall be uniform throughout the United States; that section 3293 R. S. of the United States provides that the tax on distilled spirits shall
31 be payable when drawn from the distillery bonded warehouse, and within three years from the date of manufacture and entry therein; that section 3368 of Revised Statutes of United States provides that the tax on snuff and tobacco shall be paid when the same is removed from the warehouse for consumption and use; that section 3342 Revised Statutes of United States provides that the tax on all fermented liquors shall be paid when the same are withdrawn from the warehouse for consumption; that section 3255 of the Revised Statutes of the United States provides that the Secretary of the Treasury and Commissioner of Internal Revenue may make rules and regulations providing for the payment of tax on alcohol produced from fruits and fruit brandy, and said Secretary & Commissioner aforesaid have provided in series 7, No. 7, that such tax shall be due and payable the 10th day of each month after its production.

Defendant charges that the tax imposed upon distilled spirits, upon fermented liquors, snuff and tobacco, alcohol produced from fruit, and fruit brandy are duties, imports, and excises within the true intent and meaning of the aforesaid article and section of the Constitution of the United States and are known as internal revenue taxes, and said aforesaid sections of the Revised Statutes

are known as internal revenue laws regulating the time,
32 mode, and manner of collecting said tax. He charges that said laws are not uniform in this, that time prescribed for the payment of tax on tobacco & snuff and fermented liquors is when the same are withdrawn from their warehouse for consumption and the time prescribed for the payment of the tax on distilled spirits is within three years from the dats of their manufacture or entry into the bonded warehouse.

Defendant charges that so much of said section 3293 of said Revised Statutes as provides that the said tax imposed upon distilled spirits within three years from the date of its bondment is in direct conflict with said article of the Constitution of the United States destroys the uniformity of the law and is null and void; and defendant charges that all the rules and regulations under which the bonds herein sued on were executed and delivered were made for the purpose and with the view of collecting said tax and forcing the withdrawal from the distillery bonded warehouse within the period limited by said 3293 section and providing heavy fines and forfeitures and penalties against this defendant if he failed to conform to said rules and regulations in any particular or failed to execute and deliver the bonds herein sued on, they being exacted by said rules and regulations. He states that said bonds were exacted and
33 given not voluntarily, but in compliance with the unconstitutional statutes and by rules and regulations made by the Secretary and Commissioner aforesaid in pursuance thereof. Wherefore he pleads and relies upon the unconstitutionality of the aforesaid tax laws under which said bonds sued on were executed, and prays to be dismissed hence with his cost and for all general & special relief.

JOHN B. THOMPSON,
Att'y for Pl'ff.

The defendant Jno. B. Thompson says the statements of the foregoing answer are true.

JOHN B. THOMPSON.

Subscribed and sworn to before me by John B. Thompson this 22nd day of February, 1886.

SAM'L B. CRAIL,
U. S. Com'r.

And on another day of said term, to wit, on Tuesday, March 30th, 1886, came the district attorney; came also the defendant, by John B. Thompson and Gabriel C. Wharton, his attorneys; thereupon the district attorney filed his demurrer to each paragraph of the answer herein; thereupon this cause came on to be heard upon such demurrer, and having been argued by counsel, and the court,
34 not being advised thereon, takes time.

The demurrer above referred to is as follows:

Demurrer to Answer.

U. S. District Court for the District of Kentucky.

UNITED STATES, Pl'ff,
vs.
JOHN B. THOMPSON, &c., Def't. } Demurrer.

1st. The pl'ff demurs to the 1st paragraph of def'ts' answer because it does not state facts sufficient to constitute a defense to the action.

2nd. It demurs to the 2nd paragraph of answer because it does not state facts sufficient to constitute a defense to the action.

3rd. It demurs to the 3rd paragraph of said answer because it does not state facts sufficient to constitute a defense to the action.

4th. It demurs to the 4th paragraph of said answer because it does not state facts sufficient to constitute a defense to the action.

5th. It demurs to the 5th paragraph of said answer because it does not state facts sufficient to constitute a defense to the action.

6th. It demurs to the 6th paragraph of said answer because it does not state facts sufficient to constitute a defense to the action.

7th. It demurs to the 7th paragraph of said answer because it does not state facts sufficient to constitute a defense to the action.

8th. It demurs to the 8th paragraph of said answer be-
35 cause it does not state facts sufficient to constitute a defense to the action.

Wherefore, &c.

J. C. WICKLIFFE,
U. S. Att'y.

Judgment on Demurrer.

And on another day of said term, to wit, on Saturday, May 8th, 1886, the court being now fully advised of the demurrer to the answer, it is therefore considered by the court that said demurrer be, and the same is hereby, sustained to the 2nd, 3rd, 4th, 5th, 6th, 7th, and 8th paragraphs of said answer and overruled as to the 1st paragraph thereof.

In deciding upon this demurrer the court delivered a written opinion, which is as follows:

Opinion of Court.

District Court of the United States for the District of Kentucky.

UNITED STATES
vs.
JOHN B. THOMPSON *et al.* } On Demurrer.

The plaintiff has sued the defendants on a bond which they executed and delivered to it, which reads thus:

"Know all men by these presents we, John B. Thompson, as

principal, and John P. Chinn and James M. Forsythe, Jr., as sureties, are held and firmly bound unto the United States of America in the just and full sum of forty-one thousand dollars; for the payment of which sum we bind ourselves, our heirs, executors,
36 and administrators, jointly and severally, firmly by these presents. Sealed with our seals and dated at Harrodsburg this the 23rd day of October, 1885. Whereas on the 8th day of April, 1885, John B. Thompson, as principal, and John P. Chinn and James M. Forsythe, Jr., as sureties, gave a certain bond conditioned for the delivery of certain distilled spirits therein named on board ship at the port of Newport News, Va., for exportation to Melbourne, Australia, and for the performance of certain other acts therein named, all of which will more clearly appear by a reference to said bond, a copy of which is hereto annexed, marked A; and whereas it is now found desirable to deliver a portion of said spirits on board ship at the port of New York for exportation, namely * * * (giving here the number of barrels of whisky and the number of gallons), by the S. W. R. R., C. N. O. and T. P. R. R., C. H. & D. N. Y. P. O., and N. Y., L. E. & W. to New York from distillery warehouse No. 63, in the 8th district of the State aforesaid: Now, therefore, the conditions of this obligation is such that if the whole of the aforesaid merchandise shall be safely delivered to the collector of customs at the said port of New York within fifteen days from date hereof, and if the said John B. Thompson, principal, shall export or cause to be exported the said merchandise in accordance with the internal revenue
37 laws and the regulations of the Treasury Department made in pursuance thereof immediately on the arrival of said merchandise at said port of New York, and shall within fifteen days thereafter produce to the collector of internal revenue for the 8th district of the State of Kentucky the certificate of the collector of customs of the said port of New York, showing that the said merchandise has been duly landed at the port of Bremen or at some other port without the jurisdiction of the United States, or shall produce satisfactory proof of the loss thereof at sea without fault or neglect of the owner or shipper thereof, as required by law and regulations, then this obligation to be void; otherwise to be and remain in full force and virtue.

JOHN B. THOMPSON.
JOHN P. CHINN.
JAMES M. FORSYTHE, JR."

The breach of the bond is alleged to be a failure to deliver to the collector of customs at New York within fifteen days or within any other time one thousand and sixty-five gallons of said whisky as they had agreed to do, and that plaintiff was damaged to the extent of the tax of ninety cents on each gallon which was due on the whisky not exported, amounting to $958.50, and that said whisky had been removed by defendants from the bonded distillery
38 warehouse of the defendant without the said tax having been paid thereon.

The defendants have answered, in which they admitted that Thompson did not export one thousand and sixty-five gallons of the whisky mentioned in the bond of October 25th, 1885, and alleged that the one thousand and sixty-five gallons of the whisky not exported was the leakage and evaporation bet-een the 1st gauge, in April, 1885, when the 1st exportation bond was executed, and the 2nd gauge, in Oct., 1885, after 2nd exportation bond was executed. They insist that after the whisky in the bonded warehouse was gauged in April, 1885, and their exportation bond accepted by plaintiff it became thereafter free from the domestic tax, and that plaintiff cannot now collect of them a tax, which is in the nature of a deficiency tax, upon whisky which would have been exported except for leakage and evaporation.

There are several defenses set up in the answer in different paragraphs, but this is the natural one and will be first considered in disposing of the demurrer filed by plaintiff to each paragraph of the answer. The contention of the defendant- is that by a fair construction of all of the sections of the law this one thousand and sixty-five gallons was not liable to a tax, and if it was, under a proper construction of the law, the law would be uncon-
39 stitutional, being a tax laid on an article exported from a State which is prohibited by the Constitution. It is no doubt true that distilled spirits of the kind known as whisky is produced in this country both for foreign and domestic use and consumption, but Congress, for the protection of the revenue, has enacted laws — control the production and custody of all such distilled spirits, w-ether for domestic use or for exportation to foreign countries, and have assumed that all such distilled spirits produced in this country is for domestic use and consumption, and have assessed a tax thereon as soon as produced. By the terms of the law the tax attaches to the distilled spirits as soon as it is in existence, and a lien is retained on the spirits and the distillery to secure its payment, and in addition to the custody and lien which the Government retains on the spirits the distiller is made to give a bond for its payment when due according to law. Sections 3248, 3251, & 3293 Revised Statutes; Ferrell *vs.* U. S., 99 U. S. R., 221. Congress recognizes the right to export such spirits without the payment of the tax theretofore assessed, but seems to relieve from the payment of the tax only to the extent of the spirits actually exported. The provision is that "distilled spirits may be withdrawn from distillery bonded warehouse at the instance of the owner of the spirits for exportation
40 in the original casks or packages without the payment of tax under such regulations and after making such entries and executing and filing with the collector of the district from which the removal is to be made such bonds and bills of lading and giving such other additional security as may be prescribed by the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, provided that bonds given under this section shall be canceled under such regulations as the Secretary of the Treasury shall prescribe: And provided further, that the bonds required to be given for the exportation of distilled spirits shall be canceled

upon the presentation of satisfactory proof and certificates that said distilled spirits have been landed at the port of destination named in the bill of lading or upon satisfactory proof that after shipment the same was lost at sea without fault or neglect of the owner or shipper."

There is another provision of this law which authorizes the execution of a transportation bond from the distillery warehouse to the port of export and the execution then of an export for the delivery of the spirits in a foreign port, to be named, and in such cases the spirits are required by express provisions to be gauged at the port of export and tax paid on any deficiency in the spirits.

41 There is also another provision of the law which allows the export of distilled spirits upon which the tax has been paid and a refunding of the tax paid, and only the tax upon the actual amount exported is refunded, and no tax is refunded upon spirits which have evaporated or leaked out of casks between the time the tax was paid and the exportation. Section 3329. The regulations under which defendants executed these bonds clearly contemplated that only the spirits actually exported shall be relieved from the payment of the tax. Construing all the provisions of the statutes together, we do not doubt the legislative intent was to release from taxation only such distilled spirits as leave the port of exportation.

It is, however, insisted that after the *guage* of the whisky in April, 1885, and the execution of the export bond in April, 1885, this whisky was constructively in process of exportation, though not actually on its way, and that a tax upon the spirits which leaked out of the casks or which evaporated is a tax on exports, and although Congress may have laid such a tax it is unconstitutional. It is not to be overlooked in this connection that the export bond executed in April, 1885, was to export by the way of Newport News to Melbourne, Australia, and that this proposed exportation was abandoned when the second bond was executed, in October,

42 1885, which covered an exportation to Bremen, Germany, by the way of the port of New York. Thus when this whisky was gauged in the distillery warehouse of defendant Thompson in October, 1885, and the second bond executed the first intended exportation was abandoned, and that intended exportation cannot be considered as the commencement of an exportation which was actually made through a different home port and to a different foreign country. This question might well be considered as if the right to export the def't- whisky had been attempted to be exercised for the 1st time in October, 1885, and the April bond had never been executed and the leakage and evaporation had accur-ed before defendant Thompson had attempted to exercise in any manner his right of exportation; but suppose we are wrong in this view, and that the execution of the bond in April, 1885, and the gauging of the whisky and the affixing of the export stamps on the packages was a declaration of Thompson's intention to export his whisky and a recognition by the Government of his right to do so, and his action in October was a mere change of the route and place of exportation with the consent of the Internal Revenue Department, the question

arrieses, Is this a "tax laid upon articles exported" from a State?

If this provision is to be construed as if it was a prohibitory
43 statute this tax would certainly not be one laid upon an article exported from this country, as it is admitted that this one thousand and sixty-five gallons of distilled spirits never left the State of Kentucky; but I do not understand that a constitutional prohibition is to have the literal and narrow construction that would be given a statute.

It is to be construed as announcing and prescribing a general principle without indicating the details; hence any tax or duty which would be within the principle of this prohibition would be unconstitutional.

Yet, in considering the constitutionality of an act of Congress, the courts will be inclined to sustain its constitutionality and solve all mere doubts in favor of its validity. If there were no internal revenue tax laid on distilled spirits, and Congress should lay a tax upon the spirits which evaporated while ripening for foreign markets or upon the shrinkage from any other natural cause between the distillation and the exportation, there might be strong grounds for contending that such a tax was laid upon spirits exported from this country. But in this instance there is a domestic tax upon distilled spirits, and the evaporation in the ripening of the spirits for either home or foreign use has already been deducted, and hence

the collection of the revenue tax upon spirits which may
44 evaporate or leak from the casks beyond the amount already allowed and before exportation cannot, I think, be laying a tax upon an article exported from any State within the constitutional meaning. It is a proper and valid provision intended to protect the revenue- of the United States which are laid upon home consumption and is not a tax laid upon exports. The Supreme Court has in two carefully considered cases sustained as constitutional an act of Congress requiring a stamp to be affixed to each case of tobacco exported, and that the exporter should pay the U. S. twenty-five cents for each stamp, although the cost to the U. S. for such stamps was much less then that amount.

This stamp was affixed for the purpose of identification and designation and thereby to protect the collection of *of* internal revenue tax. Pace *vs.* Burgass, 92 U. S. R., 372; Turpin *vs.* Burgass, 117 U. S. R., S. C. Supreme Court Reporter, 835. The recent case of Coe *vs.* Errel, 116 U. S. R., 524, fully sustains in principle the view herein indicated. In that case the question was w-ether logs cut in the State of New Hampshire and floated down the Androscroggin river to the town of Errol, in that State, and on their way down said river to Lewiston, in the State of Maine, and there detained for a season—about a year—

which belonged to citizens and residents of Maine, could
45 to be taxed by the town of Errol under the New Hampshire statute. The owners of these logs were in the habit of cutting them in the forest and then floating them down to Errol and there let them remain for one season, and then run-ing them down the river to Lewiston, Maine, and there saw them into lumber or

disposing of them to others. They claimed they gave in as part of their stock in Maine for taxation these logs. It was insisted, among other reasons, why this tax could not be levied that it was within that provision of the Constitution which declar*se* "No State shall, without the consent of Congress, lay any imposts or duties on imports or exports except what may be absolutely necessary for executing its inspection laws." The opinion of the court states the question thus: "Are the products of a State, though intended for exportation to another State and partially prepared for that purpose by being deposited at a place or port of shipment within the State, liable to be taxed like other property within the States? Do- the owner's mind in relation to the goods—that is, his intent to export them and his partial preparation to do so—exempt them from taxations? This question does not present the predicament of goods in course of transportation through a State, though detained for a time in the State by low water or other causes of delay. Such
46 goods are always in the course of commercial transportation and are clearly under the protection of the Constitution; and so we think would the goods in question be when actually started in the course of transportation to another State or delivered to a carrier for such transportation. There must be a point of time when they cease to be governed exclusively by the domestic law and begin to be governed and protected by the national law of commercial regulations, and *and* that *n*oment seems to us to be a legitimate one for this purpose in which they commence their final movement for transportation from the State of their orig-n to that of their destination. When the product- of the farm or the forest are collected and brought in from the surrounding country to a town or station, serving as an entrepot for that particular region, whether on a river or a line of railroad, such products are not yet exports, nor are they in process of exportation, nor is exportation begun until they are committed to the common carrier for transportation out of the State to the State of their destination or have started on th*ere* ultimate passage to that State. Until then it is not reasonable to regard them as not only within the State of their origin, but that as part of the general mass of property of the State, subject to its jurisdiction and liable to taxation there,
47 if not taxed by reason of th*ere* being intended for exportation, but taxed without discrimination in the usual way and manner in which such property is taxed in the State. Of course they cannot be taxed as exports—that is to say, they cannot be taxed by reason or because of their exportation or intended exportation—for that would amount to laying a duty on exports, and that would be a plain infraction of the Constitution, which prohibits any State, without the consent of Congress, from laying any imposts or duties on imports or exports." The court was discussing the authority of a State to tax under the clause of the Constitution prohibiting a State from laying imposts or duties on imports or exports, but the prohibition as to exports is similar in language to the clause now under consideration, and the opinion is decisive of this question. When the question arises the Supreme Court may

determine that the final movement for the transportation of exports out of the United States does not commence until and when the exports leave the territory of the United States, or it may decide that the commencement of exportation to a foreign country is when the article or goods first start on their way to a foreign country by through bill of lading, &c., but this question does not arise
48 in this case as the deficiency one thousand and sixty-five gallons, whether from leakage, evaporation, or removal, occur-ed before the whisky left the distiller's bonded warehouse. The conclusion to which I have arrived is perfectly consistent with the language of the opinion of Att'y General Garland of August 5th, 1885, if that opinion be read, as it should be, by the light of the question he was discussing. The defendants insist in one of their paragraphs that the Commissioner of Internal Revenue has no authority from Congress to limit the time within which this whisky should be exported, and that had such authority been given him by Congress the law would be unconstitutional. There is no limitation as to when distilled spirits should be exported either by the Commissioner or by Congress. There is, however, a time prescribed by Congress within which distilled spirits should be withdrawn from the bonded warehouse and the tax of ninety cents per gallon paid thereon. This applies to all such distilled spirits as that produced by defendant Thompson and is a proper and constitutional provision made for the purpose of collecting a domestic tax which Congress has a perfect right to levy and collect. The right of the citizen to export the distilled spirits upon which the tax has been paid still remains by an ex-
49 press provision of law and the tax of the spirits exported are refunded. The regulations made under the provisions of section 3330 al-owed the owner of distilled spirits by a declaration of an intention to export his spirits and the execution of the required transportation or exportation bond to extend the time beyond the three years to withdraw the spirits for exportation. This was not an indefinate extention, but properly limited, else the efficiency of the revenue service would have been impaired and the collection of the domestic tax seriously endangered. The constitutional power of Congress to make such a limitation as to time of exportation or to authorize the Treasury Department to make it arises from the power to levy the domestic tax. I do not therefore think the defense could avail defendants if they were in condition to plead it; but as the thousand and sixty-five gallons of spirits had not and cannot at any time be exported they could not rely upon this defense, if it were a good one. The objection to the constitutionality of the ninety cents per gallon tax because of a want of uniformity cannot be sustained. This tax is uniform throughout the United States, and any difference in the rate or time of payment of the tax is based upon a valid classification. U. S. *vs.* Singer, 15 Wal.,
50 111; Head Many Cases, 112 U. S. R., 594. Neither is the paragraph which sets up accord and satisfaction as a defense good.

The bond sued on is the last bond given, and if plaintiff is dam-

aged by a breach of this bond to the extent of the tax or the spirits not exported, as herein decided, there has been no accord and satisfaction of the bond. The defendants in another paragraph alleged that the bond sued on was obtained by duress. The facts which they alleged to sustain this defense are that the export bond of April 8th, 1885, was an entirely, and that there was not a breach of this bond if he exported the distilled spirits and duly landed same at the port of Melbourne, Australia, within twenty-five months from April 8th, 1885, and that a failure to transport the spirits to Newport News and deliver said spirits to the collector of customs at said port within seven months from the date of said bond would not be a breach of this bond and give the U. S. the right to collect the tax upon said spirits; but that the Commissioner of Internal Revenue, under the advice of the Att'y Gen'l, decided that a failure to deliver said spirits to the collector of customs at Newport News within the seven months would be a forfeiture of defendant's right to export and make the tax due and as liable to be seized for said tax, and that to save himself from the consequence of this
51 construction of said bond he was obliged to change the route to New York and the export port to Bremen, Germany; and to do this a new bond, the one sued on, was required of him. If the defendant's construction of the April bond was the correct one he might have paid the tax or allowed the seizure of the whisky and its sale by the officers of the revenue service and appealed to the Government for indemnity for his loss by reason of a violation of the contract. I can well imagine the practical di-ficulties under which defendant Thompson acted, but this court must assume and Thompson should assume that if he were legally wronged in this matter his Government would have compensated him for the wrong done; hence the execution of the second bond was the voluntary act of the defendant's and not obtained by force and duress, even if the defendant's construction of the April bond be the correct one, which it is not, we think.

The want of notice of the deficiency, which is pleaded in the seventh paragraph of the defendant's answer, does not apply to the one thousand and sixty-five gallons upon which tax is claimed in this action. The notice required by regulations, series 7, No. 4, Art. 53, applies to deficiencies which occur between the bonded
52 warehouse and the port of export. The demurrer should therefore be sustained to all of the paragraphs of the answer except the 1st, which is good so far as it denies any demand of payment of the $958.50 by the collector, and it is so ordered.

Jury Trial. Verdict for U. S.

And at another term of our said court, held for its February term, 1887, to wit, on Saturday, March 12th, 1887, came the district attorney; came also the defendant; thereupon came a jury, to wit: Marion Smith, C. T. Campbell, Joseph Deddens, M. M. Green, Thomas C. Gooch, Jr., Ed. Penn, H. A. Hays, J. M. Barnett, Jas. Claybrook, James Bregman, D. S. Taylor, and Murry Brown, who were elected,

tried, and sworn to well and truly try *try* the issue joined. The jury heard the evidence, and retired to consider of their verdict, and returned into court the following verdict, to wit:

"We, the jury, find for the United States in the sum of one thousand and twenty-three dollars and sixty-one cents.

M. M. GREEN, *Foreman.*"

Judgment.

It is therefore considered by the court that the plaintiff, the United States of America, recover of the defendants, John B. Thompson, John P. Chinn, and James M. Forsythe, Jr., the sum of one thousand and twenty-three dollars and sixty-one cents, the sum so assessed by the jury in their verdict aforesaid, with interest
53 thereon at the rate of six per cent. per annum from this 12th day of March, 1887, until paid; also its costs herein expended. To all of which the defendants except.

Then, af-erwards, on the 31st day of March, 1887, came the defendants and filed their appeal bond, which is as follows:

Appeal Bond.

District Court of the United States, District of Kentucky.

UNITED STATES OF AMERICA
vs.
JOHN B. THOMPSON, JOHN P. CHINN, and JAMES M. FORSYTHE, JR.

Know all men by these presents that we, John B. Thompson, John P. Chinn, and James M. Forsythe, Jr., principals, and W. H. Thomas, surety, are held and firmly bound unto the United States of America in the sum of two thousand one hundred dollars, to be paid to the said United States of America, executors or administrators; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents. Sealed with our seals and dated this 31st day of March, A. D. 1887. Whereas the above-named John B. Thompson, John P. Chinn, and James M. Forsythe, Jr., hath prosecuted a writ of error to the circuit
54 court of the United States to reverse the judgment rendered in the above-entitled suit by the district court of the United States for the district of Kentucky at Louisville: Now, therefore, the condition of this obligation is such that if the above-named John B. Thompson, John P. Chinn, and James M. Forsythe, Jr., shall prosecute their said writ of error to effect and answer all damages and costs if they shall fail to make good their plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

JOHN B. THOMPSON. [L. S.]
W. H. THOMAS. [L. S.]

Sealed and delivered in presence of—
PERCY THOMAS.
SAM'L B. CRAIL.

Approved. JNO. W. BARR, *Judge.*

DISTRICT OF KENTUCKY, U. S.:

I, Sam'l B. Crail, clerk of the district court of the United States for the district aforesaid at Louisville, do hereby certify that the foregoing 54 pages there included contain a true and complete transcript of the record of the proceedings had in the court in the case mentioned in the captian hereof.

Witness my hand and the seal of said district court this 2nd day of April, 1887.

SAM'L B. CRAIL, *Clerk.*

55 *Writ of Error to Dist. Court.*

UNITED STATES OF AMERICA, *District of Kentucky,* } *ss:*

The President of the United States of America to the judge of the district court of the United States for the Kentucky district, Greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said district court, before you, between the United States of America, plaintiffs, and John B. Thompson, John P. Chinn, and James M. Forsythe, Jr., defendants, a manifest error hath happened, to the great damage of the said John B. Thompson, John P. Chinn, and James M. Forsythe, Jr., as by their complaint appears, and, it being fit that the error, if any there hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same, to the circuit court of the United States, together with this writ, so that you have the same at the city of Louisville, on the first day of the next October term, in the said circuit court to be then and there held, that, the record and proceedings aforesaid being inspected, the said circuit court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

56 Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, and the seal of said circuit court, at Louisville, in said district, this 31st day of March, A. D. 1887, and of the Independence of the United States the 111th.

[L. S.] SAM'L B. CRAIL,
C. C. C., K. D.

Allowed by—
JNO. W. BARR, *Judge.*

Citation.

UNITED STATES OF AMERICA, *District of Kentucky*, } ss:

To the United States of America, Greeting:

You are hereby cited and admonished to be and appear at a circuit court of the United States, to be held at Louisville, in and for the district of Kentucky, on the 3rd day of October next, pursuant to a writ of error filed in the clerk's office of the district court of the United States for the said district of Kentucky, wherein John B. Thompson, John P. Chinn, and James M. Forsythe, Jr., are plaintiffs and you are defendants in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 31st day of
[L. S.] 57 March, in the year of our Lord 1887, and our Independence the 111th.

JOHN W. BARR, *Judge.*

I hereby accept service of the within citation this 31st March, 1887.

J. C. WICKLIFFE,
U. S. Attorney, Dist. of Ky.

Assignment of Errors.

Circuit Court of the United States for the 6th Circuit and District of Kentucky.

THE UNITED STATES, Pl'ff,
vs.
JOHN B. THOMPSON *et al.*, Def'ts. } Assignment of Errors by Defendants.

The defendants, John B. Thompson and others, come complaining of the opinion and judgment of the court heretofore rendered herein against them and assign the following errors for a reversal of the same, viz:

1st. The court erred in sustaining the demurrer to the first paragraph of defendants' answer, because said paragraph stated facts sufficient to constitute a legal and valid defense to plaintiff's action.

2nd. The court erred in sustaining the demurrer to the second paragraph of defendants' answer, because said paragraph stated facts sufficient to constitute a legal and valid defense to plaintiff's action.

3rd. The court erred in deciding that the distilled spirits set forth and decribed in the second paragraph of defendants' answer and the same embraced in the bond, form B, of date of April 8th, 1885,
58 were not in due process of expórtation on and after the execution and delivery of said bond by defendant and its acceptance by plaintiff.

4th. The court erred in deciding that after said date of April 8th, 1885, the said distilled spirits embraced and included in said bond or any part thereof was subject or liable to a domestic tax of 90c. per gallon or any other tax to the plaintiff.

5th. The court erred in deciding that the tax sued for, being a deficiency tax for natural evaporation and leakage from April 8th to October —, 1885, was not a tax on the residu- of the spirits which were exported and therefore not enforceable.

6th. The court erred in deciding and assuming that the legislative branch of the Government has the power and legal authority to impose taxation without limitation and has the power and legal authority to tax productions in such manner as to tax or lay a burden on exportation or prevent the same.

7th. The court erred in deciding that the plaintiff, in a suit upon an export bond, such as sued on, executed by the owner of distilled spirits, and under the breaches of such bond as charged in plaintiff's action, can recover in debt for taxes assumed to be due the plaintiff by the original distiller or factor of the spirits for and on account of his having originally produced said spirits and which it is claimed attached thereto as the time of each production.

8th. The court erred in deciding that the plaintiff could recover in an action on this bond anything beyond the actual damages
59 sustained by reason of its breach, which is nothing, as the distilled spirits had evaporated while in process of exportation and were not bound or liable to plaintiff for any tax during the time of exportation and at the time the loss occurred.

9th. The court erroed in sustaining the demurrer to the 3rd paragraph of the defendants' answer because the facts therein stated constitute a legal and valid defense to plaintiff'- action and are a good accord and satisfaction of all taxes which accrued to the plaintiff for and on account of the production of the distilled spirits sued for and embraced in the bond, and if any liability is upon the defendants it is not for the taxes for original production but for some matter that has accrued since the acceptance of the bond sued on by reason of some failure on the part of defendants to perform its conditions.

10th. The court erroed in deciding that the legislature'- intent was to reli-ve only from the tax on spirits actually taken out of the United States, because it had, by enactment, provided for all evaporation and leakage from date of production to end of three years and for all additional loss for any casualty, and had also provided — all loss that might occur from accident, &c., during transportation from distillery to port of export, thus recognizing the principal that no tax shall be laid on exports and seeking to provide against it.
60 The intent failed in this case because of the change of time allowed, from thirty days to seven months.

11th. The court erroed in deciding that defendant Thompson, after the execution of the bond of April 8th, 1885, never abandoned his right to export or intended to abandon it. This assumption of the court is contradicted by the 4th paragraph of the answer.

12th. The court erroed in sustaining the demurrer to the 4th para-

graph of defendants' answer, because it states facts sufficient to constitute a legal and valid defense to plaintiff's petition.

13th. The court erred in deciding that the bond of October, 1885, was not obtained by force and dures- and was the voluntary act of defendant.

14th. The court erred in deciding that if Thompson had failed to deliver the spirits in seven months to collector at port of export, as at Newport News, Va., from date of bond of April 8th, 1885, as agreed in said bond, that he forfeited his right to export said spirits, and plaintiff could proceed against him as if no bond had been given.

15th. The court erred in deciding that the bond of April 5th, 188–, was not an entirely and not seperable; that there was but one thing contracted to be done, and that was to export spirits described in the bond to Melbourne or some other port outside of the
61 jurisdiction of plaintiff in the time limited by the bond, which was twenty-five months.

16th. The court — in deciding that all the rights to tax and remedies of plaintiff for collection of tax wer- not suspended during the continuance and validity of said bond, which is twenty-five months, and that said spirits — not tax free.

17th. The court erred in deciding that the plaintiff — Treasury Department could distroy the obligation of defendants' contract with plaintiff by rules and regulations made subsequently to said contract and for the purpose of annul-ing the same.

18th. The court erred in sustaining the demurrer to the 5th paragraph of defendants' answer because it states facts sufficient to constitute a legal and valid defense to plaintiff's action.

19th. The court erred in deciding that plaintiff or its Treasury Department had authority to limit the time in which a citizen could export his articles free of tax. The right to limit implies right to distroy.

20th. The court erred in sustaining the demurrer to the 6th paragraph of defendants' answer because it states facts sufficient — constitute a legal and valid defense to the petition.

21st. The court erred in deciding that after plaintiff has voluntarely granted the seven months' time it was not estopped to
62 collect a tax for natural loss and evaporation during the time granted.

22nd. The court erred in sustaining the demurrer to the 7th paragraph of the answer because its states facts sufficient to constitute a valid defense to the action.

23rd. The court erred in sustaining the demurrer to the 8th paragraph of the answer because it states facts sufficient to constitute a legal and valid defense to plaintiff's action.

24th. The court erred in deciding that the rate and dif-erance in taxation and of time of payment as set forth in the answer are founded upon a valid classification and as not distroy the uniformity and equality of the law and taxation imposed.

25th. The court erred in deciding such classification valid and constitutional.

Wherefore defendants ask for a reversel of the judgment of the court.

J. B. THOMPSON,
For Def'ts and Appellants.

Judgment Affirming Dist. Court.

And on another day of said turm of said court, to wit, on Wednesday, November 16th, 1887, came the plaintiffs in error, by John B. Thompson, their attorney; came also the defendant in error, by Thomas C. Bell, assistant United States attorney; and thereupon, this case having been heard and the court being fully advised thereof,

63 it seems to the court that there is no error in the record and proceedings had in this case in the district court. It is therefore considered by the court that the judgment of the district court be, and the same is hereby, affirmed, and that the defendant in error recover of the plaintiffs in error its costs therein expended.

The court delivered a written opinion, which is as follows:

Opinion of Cir. Judge.

Circuit Court of the United States for the District of Kentucky.

JNO. B. THOMPSON, JNO. P. CHINN, and JAMES M. FORSYTHE, JR.,	}	Error to the District Court of the United States for the District of Kentucky.
vs.		
THE UNITED STATES OF AMERICA.		

The defendant in error brought suit in the district court of the United States for the district of Kentucky against the plaintiffs in error to recover the sum of $958.50, being the internal revenue tax of 90 cents per gallon on 1,065 gallons of whisky (included in a large number of packages) which plaintiffs in error Thompson, as owner, had under and in pursuance of the statutes and the regulations of the Treasury Department given bond in October, 1885, to export from the port of New York, but which in fact were never actual-y exported. Plaintiff- in error in their answer to this action interposed various matters of defense, set out in eight separate paragraphs, to all of which the defendants in error demurred; and

64 upon the hearing of said demurrers the court below sustained the same as to the 2nd, 3rd, 4th, 5th, 6th, 7th, 8th paragraphs in defense of the answer, and overruled a disallou-nce, the demurrer as to the first paragraph, which tendered a general issue and on which a trial before a jury was had, resulting in a virdict & judgment in favor of the defendants in error for the sum of $1,023.61 and costs of suit. From this judgment the defendants below prosecute the present writ of error. The record presents no bill of exceptance. The assignment of error is confined to the action of the district court upon the demurrer. It is urged as ground for the reversal of the judgment below that the demurrer

to paragraphs 2, 3, 4, 5, 6, 7, & 8 were improperly sustained, & that the various matters set up in said several paragraphs constitute valid defense to the action. The legal questions presented by the answer and demurrer thereto have been fully and carefully considered by this court, and without undertaking to review them in detail (as they are fully and ably set forth and examined in the opinion of the district judge filed with the record) we are clearly of the opinion that the action of the court below in sustaining the demurrers to said paragraphs of the answer was correct. This court concurs fully in the conclusion reached by the district judge, that the matters set up and relied upon in said paragraphs of the answer do not constitute any valid defense to the action. The judg-
65 ment of the district court is accordingly affirmed with costs.

HOWELL E. JACKSON,
Circuit Judge.

And on the 28th day of November, 1887, came the plaintiffs in error and filed their appeal bond herein, which is as follows:

Circuit Court of the United States, District of Kentucky.

JOHN B. THOMPSON, JOHN P. CHINN, and JAMES M. FORSYTHE, JR., }
vs.
UNITED STATES OF AMERICA. }

Know all men by these presents that we, John B. Thompson, John P. Chinn, & James M. Forsythe, Jr., principals, and ——, surety, are held and firmly bound unto the United States of America in the sum of two thousand five hundred dollars, to be paid to the said United States of America, executors or administrators; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated this 28th day November, A. D. 1887.

Whereas the above-named John B. Thompson, John P. Chinn, and James M. Forsythe, Jr., hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled suit by the circuit court of the United States for the district of Kentucky, at Louisville: Now, therefore, the condition of this obligation is such that if the above-named
66 John B. Thompson, John P. Chinn, and James M. Forsythe, Jr., shall prosecute their said writ of error to effect and answer all damages and costs if they shall fail to make good their plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

JOHN B. THOMPSON. [L. S.]
W. H. THOMAS. [L. S.]

Sealed and delivered in presence of—
HENRY F. CASSIN,
Deputy Clerk U. S. Circuit Court.

Approved.

JNO. W. BARR, *Judge.*

DISTRICT OF KENTUCKY:

I, Sam'l B. Crail, clerk of the circuit court of the United States for the district aforesaid, at Louisville, do hereby certify that the foregoing 66 pages, this included, contain a true and complete transcript of the record of the proceedings had in the court in the case mentioned in the caption hereof.

Witness my hand and seal this 1st day of February, 1888.

[Seal 6th Circuit Court, Ky. Dis., U. S. of America.]

SAM'L B. CRAIL, *Clerk.*

67 UNITED STATES OF AMERICA, *District of Kentucky*, } *ss*:

The President of the United States of America to the judges of the circuit court of the United States for the Kentucky district, Greeting:

Because in the record and proceedings and also in the rendition of the judgment of a plea which is in the said circuit court, before you, between John B. Thompson, John P. Chinn, & James M. Forsythe, Jr., plaintiffs, and The United States of America, defendants, a manifest error hath happened, to the great damage of the said John B. Thompson, John P. Chinn, & James M. Forsythe, Jr., as by their complaint appears, and it being fit that error, if any there hath been, should be duly corrected and full and speedy justice done to the parties in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at the city of Washington on the first day of the next October term, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, and the seal of said circuit court, at Louisville, in said district, this 28th day of November, A. D. 1887, and of the Independence of the United States the 112th.

[Seal 6th Circuit Court, Ky. Dis., U. S. of America.]

SAM'L B. CRAIL,
C. C. C., K. D.

Allowed by—
JOHN W. BARR, *Judge.*

68 [Endorsed:] John B. Thompson *et al. vs.* United States of America. Writ of error.

69 UNITED STATES OF AMERICA, *District of Kentucky*, } ss:

To the United States of America, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be held at Washington on the 8th day of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the said district of Kentucky, wherein John B. Thompson, John P. Chinn, & James M. Forsythe, Jr., are plaintiffs and you are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Seal 6th Circuit Court, Ky. Dis., U. S. of America.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 28th day of November, in the year of our Lord 1887, and of our Independence the 112th.

JNO. W. BARR, *Judge.*

70 [Endorsed:] John B. Thompson *et al. vs.* The United States of America. Citation.

I hereby accept service of the within citation this 9 January, 1888.

J. C. WICKLIFFE,
U. S. Attorney.

71 Supreme Court of the United States of America.

JOHN B. THOMPSON *et al.*, Plaintiffs in Error,
vs.
THE UNITED STATES OF AMERICA, Defendant in Error. } Assignment of Errors by Plaintiffs in Error.

The plaintiffs in error, John B. Thompson, John P. Chinn, and James M. Forsythe, Jr., come complaining of the opinion and judgment of the court heretofore rendered herein against them, and assign the following errors for a reversal of the same, viz:

The court erred in its opinion and judgment in sustaining the opinion and judgment of the district judge in the arguments and conclusions reached in said opinion and judgment and in sustaining the demurrers of the 2, 3, 4, 5, 6, 7, & 8 paragraphs of plaintiffs in error's answer to defendants in error's action against *him*, and which may be specifically stated as follows:

1st. The court erred in sustaining the demurrer to the first paragraph of defendants' answer because said paragraph stated facts sufficient to constitute a legal and valid defence to plaintiff's action.

2nd. The court erred in sustaining the demurrer to the second paragraph of defendants' answer because said paragraph stated facts sufficient to constitute a legal and valid defence to plaintiff's action.

3rd. The court erred in deciding that the distilled spirits set forth and described in the second paragraph of defendants' answer and

the same embraced in the bond, form B, of date of April 8th,
72 1885, were not in due process of exportation on and after the execution and delivery of said bond by defendant- and its acceptance by plaintiff.

4th. The court erred in deciding that after said date of April 8th, 1885, the said distilled spirits embraced and included in said bond or any part thereof was subject or liable to a domestic tax of 90c. per gallon or any other tax to the plaintiff.

5th. The court erred in deciding that the tax sued for, being a deficiency tax for natural evaporation and leakage from April 8th to October —, 1885, was not a tax on the residue of the spirits which were exported, and therefore not enforceable.

6th. The court erred in deciding and assuming that the legislative branch of the Government has the power and legal authority to impose taxation without limitation and has the power and legal authority to tax production in such manner as to tax or lay a burden on exportation or prevent the same.

7th. The court erred in deciding that the plaintiff in a suit upon an export bond such as sued on, executed by the owner of distilled spirits, and under the breaches of such bond as charged in plaintiff's action can recover in debt for taxes assumed to be due the plaintiff by the original distiller or factor of the spirits for and on account of his having originally produced said spirits and which it is claimed attached thereto at the time of such production.

73 8th. The court erred in deciding that the plaintiff could recover in an action on this bond anything beyond the actual damages sustained by reason of its breach, which is nothing, as the distilled spirits had evaporated while in process of exportation and were not bound or liable to plaintiff for any tax during the time of exportation and at the time the loss occurred.

9th. The court erred in sustaining the demurrer to the 3rd paragraph of the defendants' answer because the facts therein stated constituted a le*agl* and valid defense to plaintiff's action and are a good accord and satisfaction of all taxes which accrued to the plaintiff for and on account of the production of the distilled spirits sued for and embraced in the bond, and if any liability is upon the defendants it is not for the taxes for original production, but for some matter that has accrued since the acceptance of the bond sued on by reason of some failure on the part of defendants to perform its conditions.

10th. The court erred in deciding that the legislative intent was to relieve only from the tax on spirits actually taken out of the United States because it had by enactment provided for all evaporation and leakage from date of production to end of three years and for all additional loss for any casualty, and had also provided for all loss that might occur from accidents, &c., during transportation from distillery to port of export, thus recognizing the princip*al* that no tax shall be laid on exports and seeking to provide against it. The intent failed in this case because of the change of
74 time allowed from thirty days to seven months.

11th. The court erred in deciding that defendant Thomp-

son, after the execution of the bond of April 8th, 1885, ever abandoned his right to export or intended to abandon it. This assumption of the court is contradicted by the 4th paragraph of the answer.

12th. The court erred in sustaining the demurrer to the 4th paragraph of defendants' answer because it states facts sufficient to constitute a legal and valid defense to plaintiff's petition.

13th. The court erred in deciding that the bond of October, 1885, was not obtained by force and duress and was the voluntary act of defendant-.

14th. The court erred in deciding that if Thompson had failed to deliver the spirits in seven months to the collector at port of export, at Newport News, Va., from date of bond of April 8th, 1885, as agreed in said bond, that he forfeited his right to export said spirits, and plaintiff could proceed against him as if no bond had been given.

15th. The court erred in deciding that the bond of April 5th, 188–, was not an entirety and not seperable; that there was but one thing contracted to be done, and that was to export spirits described in the bond to Melbourne or some other port outside of the jurisdiction of plaintiff in the time limited by the bond, which was twenty-five months.

16th. The court erred in deciding that all the rights to
75 tax and remedies of plaintiff for collection of tax were not suspended during the continuance and validity of said bond, which is twenty-five months, and that said spirits were not tax free.

17th. The court erred in deciding that the plaintiff's officers of the Treasury Department could destroy the obligation of defendants' contract with plaintiff by rules and regulations made subsequently to said contract and for the purpose of annulling the same.

18th. The court erred in sustaining the demurrer to the 5th paragraph of defendants' answer because it states facts sufficient to constitute a legal and valid defence to plaintiff'- action.

19th. The court erred in deciding that plaintiff or its officers of the Treasury Department had authority to limit the time in which a citizen could export his articles free of tax. The right to limit implies right to destroy.

20th. The court erred in sustaining the demurrer to the 6th paragraph of defendants' answer because it states facts sufficient to constitute a legal and valid defence to the petition.

21st. The court erred in deciding that after plaintiff has voluntarily granted the seven months' time it was not estop-ed to collect a tax for natural loss and evaporation during the time granted.

76 22nd. The court erred in sustaining the demurrer to the 7th paragraph of the answer because it states facts sufficient to constitute a valid defense to the action.

23rd. The court erred in sustaining the demurrer to the 8th paragraph of the answer because it states facts sufficient to constitute a legal and valid defence to plaintiff's action.

24th. The court erred in deciding that the rate and difference in taxation and time of payment as set forth in the answer are founded

upon a valid classification and do not destroy the uniformity and equality of the law and taxation imposed.

25th. The court erred in deciding such classification valid and constitutional.

Wherefore the plaintiffs in error pray for a correction of all the above errors in the opinion of the circuit court and a reversal of the judgment against them and for all proper relief.

PHIL. B. THOMPSON, JR.,
Of Counsel for Plaintiffs in Error.

Endorsed on cover: Case No. 13,131. Kentucky C. C. U. S. No. 124. John B. Thompson, John P. Chinn, and James M. Forsythe, Jr., plaintiffs in error, *vs.* The United States. Filed September 27, 1888.

Office Supreme Court U. S.
FILED.
DEC 10 1891
JAMES H. McKENNEY.

Supreme Court of the United States.

OCTOBER TERM, 1891.

JOHN B. THOMPSON AND OTHERS,
APPELLANTS,
vs.
THE UNITED STATES, APPELLEES.
No. 13,131

BRIEF FOR APPELLANTS.

PHIL B. THOMPSON, JR.,
For Appellants.

WASHINGTON:
GIBSON BROS., PRINTERS AND BOOKBINDERS.
1891.

Supreme Court of the United States.

OCTOBER TERM, 1891.

JOHN B. THOMPSON AND OTHERS, APPELLANTS,

v.

THE UNITED STATES, APPELLEES.

No. 13,131.

This is a suit upon a bond executed by Thompson as the owner of certain distilled spirits which he desired to export, in accordance with the provisions of section 3330 of the Statutes. In this bond he stipulated to deliver the whole of the whisky named therein to the Collector at port of export within the time named. The breach charged is that he failed to deliver 1,065 gallons of said whisky. It is admitted that the plaintiff cannot, as decided by Garland, the Attorney-General, in his opinion of August 5, 1885, take a forfeiture of this bond, and collect the amount of the penalty, viz., $41,000, and that he was in error, and that the plaintiff can recover only the actual damages it has sustained, which is claimed to be 90c. a gallon on said amount not delivered. It is, therefore, essential to show that the distilled spirits not delivered were bound or liable to pay a tax of 90c. per gallon, because, if they were not, the plaintiff could not be damaged by reason of the failure of defendant to deliver. The plaintiff had to also charge that the spirits were not

only not delivered as stipulated, but had been withdrawn from the distillery warehouse without the payment of the tax of 90c.

These two charges would authorize a recovery against defendant Thompson, independent of the bond, if not denied, Thompson being the original producer of spirits. Thompson therefore denied that the spirits were withdrawn from the warehouse without payment of tax, but stated what had become of them—that they had evaporated. So, as long as this issue stands, no recovery can be had against him for and on account of his having produced the spirits; and it was in response to these allegations, also of petition, he plead the settlement and first bond, as an accord and satisfaction, in the third paragraph of his answer. Of course, a settlement made before the bond sued on was executed could not be an accord and satisfaction for any breach of its conditions; but if the Court, as Judge Barr has in his opinion indicated, undertakes to hold defendant responsible for taxes which it is assumed attached to the spirits upon their production, and because thereof, then the matters plead are a good accord and satisfaction to such claim. The Court must not, as the Judge below seems to have done, overlook the fact that the sections which levy a tax of 90c. on distilled spirits intended for domestic consumption and make them attach and become a a lien thereon, as well as a lien upon all the property of the distiller, relate to a different subject-matter than that to which section 3330 can be made to apply. The former makes the distiller alone and his property and warehouse bond responsible for the tax. The Government knows and recognizes no one in connection with the tax on spirits except the distiller or producer, while under section 3330 it recognizes any owner of the spirits and authorizes

him to withdraw them free of tax for exportation. The owner of spirits who withdraws them for exportation under this section does not become bound or liable for any tax or liability incurred by the distiller, nor is his property, viz., the spirits, after it is withdrawn, so liable, nor are the sureties upon his export bond so liable. Thompson and his sureties therefore in this suit and upon the stipulations of this bond occupy the same position and relation to the plaintiff that any other owner of the spirits would, and if any other owner would not be responsible for the claimed tax for breach of the bond no judgment can be had against defendants.

The question, then, is not whether Thompson, as distiller or producer, is indebted to the plaintiff for removing spirits from his warehouse in fraud of the revenues, but whether since the execution of the bond anything has occurred to make the defendants liable in damages to the plaintiff; and in considering this it is not necessary to inquire whether the distilled spirits when produced became bound for a tax, only so far as to see if at the time of occurrence of the thing complained of they still remained bound, and that therefore plaintiff was damaged, by reason of their non-delivery, by loss of its revenue. It is essential in this case to establish a damage to plaintiff to show loss of its revenue. I do not consider it can be fairly inferred from a consideration of the sections of statutes that the Government intended to levy a tax upon production, but, merely to prevent fraud, made the tax attach at that time, for it has by section —— taxed the capacity of distiller and compels him to produce eighty per cent. of his daily capacity or pay a deficiency tax for what is not produced. It might as well be claimed that it therefore taxes non-production. It is not intended as a tax on production but a measure to prevent fraud, for by act 1880 an allowance

is made for all natural evaporation and shrinkage in proportion to the time the spirits have remained in the warehouse. The Court states the principle correctly when it says that Congress has recognized the right to export the spirits free of tax theretofore assessed, but misstates when it says it has only relieved from this tax the amount actually exported. Congress has not only recognized this right, but has attempted to provide in all cases for its exercise without the payment of any tax of any kind, by giving the amount of natural leakage and shrinkage as fixed by act of ———, 1880, known as Carlisle bill, and by act of December 20, 1879, allowing for all loss during transportation. Now under the statutes and rules and regulations before they were amended on January 6, 1885, these two provisions covered all the shrinkage, leakage, loss, and evaporation that could occur between the date of production and exportation of the spirits, because they were not before said change allowed to remain in the warehouse for any purpose beyond the three years, and were only allowed then thirty days for transport from distillery warehouse to port of export. The 7½ gallons was ample to cover the evaporation, &c., during the three years, and the Secretary of the Treasury had to allow for loss during transportation, which only left the actual amount carried out. The legislative intent was not, therefore, to relieve only what was actually exported, but to relieve from any liability for the difference between what was exported and what had been produced. The difficulty in this case grows out of the thirty days having been extended to seven months, and the action of the Department in having the second gauge made in October to prevent a claim being preferred by defendant under act of 1879 for leakage during transportation, Congress having used the word "transportation" in said act instead of the words "process of exportation." The in-

tention of Congress was to relieve from any burden or claim for taxes during process of exportation, because such a claim was forbidden by the Constitution; but it used a much narrower term, transportation, which, however, was sufficient under the thirty-day rule to attain the object, but not sufficient under the seven months' rule, and the Department is now trying to take the advantage of the use of the word transportation to defeat the manifest intention of Congress to relieve the owner of export goods from the annoyance of an unconstitutional tax. This cannot succeed, because the judgment in this case must be for damages, and if at the time the evaporation occurred the spirits were not subject to a domestic tax, it can make no difference to the plaintiff whether they evaporated or were exported.

The Judge seems in his opinion to realize this, and undertakes to review all of the opinions of the Attorneys-General referred to, as also to disregard the rules and regulations of the plaintiff's Treasury Department made in accordance therewith.

The Court, in its opinion, undertakes to state that Thompson, after the execution of the bond of April, 1885, for exportation *via* Newport News to Melbourne, abandoned this commenced exportation and undertook another exportation *via* New York to Bremen, and to argue, therefore, as the leakage and evaporation occurred between the execution of the bonds in April and October, and the first was abandoned—not being in process of exportation at the time of such loss—they were subject to taxation as any other spirits or articles of like character. In order to come to such a conclusion it is necessary for the Court to ignore the entire statements of the 4th paragraph of the answer, also the recitals of the bond sued on, which are as follows: Whereas, on the 8th day of April, 1885, John

B. Thompson * * * gave a certain bond conditioned for the delivery of certain distilled spirits therein named at the port of Newport News, Va., for exportation to Melbourne, Australia, and for the performance of certain other acts, * * * a copy of which bond is attached, marked "A;" and whereas it is now found desirable to deliver a portion of said spirits on board of the vessel at New York for exportation, &c., &c. The plaintiff's Treasury Department, by certain rules and regulations of May 26, 1885, series 7, No. 4, Supplement No. 3, pp. 7, 8, 9, provided for the change of route which they afterwards forced defendant to make, and the Commissioner of Internal Revenue was authorized by said regulations to pass upon the very question of whether the spirits were originally entered in good faith for exportation, and if so, whether it had been abandoned or not, and if he decided upon the evidence submitted either of these points against the party applying for the change of route, he should refuse the application and collect the taxes on the spirits.

The Commissioner of Internal Revenue decided, upon Thompson's application, that he (Thompson) had the right to change the route of the spirits and that no tax was due thereon, and ordered the Collector to take the bond of October, 1885. This question was adjudicated at that time between plaintiff and defendant, and plaintiff is estopped thereby to claim either that the spirits were not entered in good faith for exportation or that it was abandoned. How, then, can the Court assume that such was the fact and make such assumed fact the basis of a correct opinion? Not only this, but it was provided by Sec. 8, page 11, said series, that no regauge should be had upon such withdrawals.

Anticipating that some of the packages entered for exportation might be afterwards tax paid, and knowing that

under the gauge had that the evaporation and shrinkage during the three years had not on the most of them exceeded six gallons when the law would allow as much as seven and a half, the Department was thus attempting to contravene the law by refusing a regauge, but finding that in this instance that the exportation was going to be had in good faith, in violation of their own established regulation they ordered and had a regauge made to ascertain what had been the leakage and evaporation during the seven months for a foundation for this claim and to prevent its abatement under act of 1879 for leakage and loss during transportation, and compelling this defendant to give a bond to deliver this 1,065 gallons of spirits to the Collector when they knew from the gauge had that it was not in existence at the time, having leaked out and evaporated; and could not be either delivered to the Collector of the port or exported.

The question about which the Court seems to have labored so hard seems to us as, far as the parties to this action are concerned, is "*res adjudicata*:" that is, whether, after the execution of the bond of April 8, 1885, the spirits were in process of exportation and free from the payment of a domestic tax.

What does the plaintiff's Treasury Department say upon this subject by its rules and regulations? The attention of the Court is called to what is known as circular letter 282, dated January 6, 1885, in which the Commissioner of Internal Revenue and Secretary of the Treasury say:

"There being no doubt of the legal right of the owner
"to export spirits *tax free* and no objection being seen to
"giving the time reasonably and fairly necessary, there-
"fore, in deference to the opinion of Attorney-General of

" December 23, 1884, the following modifications of the " instructions of domestic spirits is issued :

" Hereafter collectors will list and report monthly on " form 23 for assessment all spirits which have remained " in the warehouse more than three years from date of " warehousing bond ; except such as are covered by ex- " port bonds filed with and duly approved by them prior " to the date and preparation of the lists, and of the con- " ditions of which bonds there has been no breach. Col- " lectors will also report spirits for assessment which have " remained in the distilling warehouse more than three " years from the date of the warehousing bond, although " covered by export bonds, in case the spirits are not with- " drawn from the warehouse within the time named in the " bond for delivery of the spirits at the port from which they " are to be exported." * * * " The regulations Series " 7, No. 4, are hereby amended by striking out the words " ' thirty days ' in the condition of the bonds prescribed " in articles X and XI thereof, and collectors are directed " to substitute such time therefor, not exceeding seven " months, as in their opinion *may be reasonably required* " *in the process of the exportation of the particular spirits* " *covered by the bonds*, including required *bona fide* and " necessary delays in the warehouse, caused by operations " incidental to exportation subsequent to the filing of the " bond, such as the affixing of stamps, arrangement with " transportation companies, procurement of bills of lading " (which under the law must be furnished before spirits " can be withdrawn from the warehouse) ; also all neces- " sary delays which may occur in promptly securing ocean " transportation to port of destination. Collectors will be " careful to see that the required declaration of intention " to export is clear and explicit, and that this and all " other proceedings are in good faith ; that the export " stamps are paid for, taxes and deficiencies paid, bonds, " with ample security, furnished, and all steps taken which, " under the law, are incidental to this transaction, by the " inception of which, in the language of the Attorney- " General, the spirits are *transformed into a different sub-* " *ject-matter from that upon which, the distillery ware-*

" *house bond had operated, and which, in his opinion, frees*
" *the spirits for the time being from any obligation for a*
" *domestic tax.*"

From this it is settled by the plaintiff's Treasury Department that exportation had and did commence with the execution and acceptance of the bond of April 8, 1885; that the subject-matter by such execution and acceptance of the bond was changed from a taxable to a non-taxable object; and that during the time being (that is during the validity of the bond), or while in process of exportation, they are free from the obligation of a domestic tax, and being free from the obligation of any tax, they occupy the same relation to the Government as any other untaxed article, except in such respects as to care, custody, and control as are proper to prevent a fraud upon its revenues by reason of the fact that articles of similar kind intended for domestic consumption are subject to a tax.

Nor is this all. The Attorney-General, in his opinion of August 5, 1885, says:

" In the event that holder or owner of such spirits shall
" have failed within the seven months specified in the
" bond to withdraw them in fact from the distillery ware-
" house, a forfeiture of the bond follows and the spirits
" are not protected thereafter from an obligation for a do-
" mestic tax. The effect of the bond while in force and be-
" fore forfeiture is to free the spirits from such obligation."

The Attorney-General, in his opinion of December 23, 1884, says:

" The exportation or transportation bond frees the spir-
" its for the time being from any obligation for a do-
" mestic tax." * * * " The giving of such bond is one
" of the acts of the owner which go to constitute the
" complex transaction of exportation." * * * " There is

" therefore no statutory reason why it may not for a pe-
" riod, reasonably required in process of exportation, re-
" main in the same custody as before, even after three
" years."

Says the Attorney-General, in his opinion of July 2, 1883:

" Export. It is important to ascertain what that word
" means. Its dictionary signification is to carry out of a
" country. By the very force of language, this denotes
" only such an act as, when completed, will result in a
" carrying out, *i. e.*, that no act can be so denoted if, at
" its completion, the thing carried has been returned."
" * * * * * * " It is, therefore, only when the ex-
" ecuted act results in carrying the thing out of the
" country that it is an exportation." * * * * * * *
" It is hardly necessary to go further upon this matter
" and say that, in speaking of an act, I include any trans-
" action done in accordance with the original intention,
" no matter how complex or how broken into bits. Unity
" of intention unites all such details into one whole."

The Attorney-General, in his opinion of Oct. 2, 1879, says: " Such freedom (from taxation) is only in *fieri*
" during transportation and during exportation, and be-
" comes factum only when landed in foreign country."

From these opinions, it is also settled that exportation commences with the execution and acceptance of the bond, and after that the spirits are in process of exportation and free from the obligation of a domestic tax. It was under these opinions of the Attorney-General, which have all the binding force of a judicial decision of a court, and under these rules and regulations of the plaintiff's Treasury Department, which have all the binding force of a statute in relation thereto, that this bond and contract was made and executed by Thompson, and Chinn and

Forsythe as his securities. It had been held and conceded by the plaintiff that after the execution of the bond the spirits were not subject to a domestic tax and were in process of exportation. How, then, can plaintiff claim a different construction, in order to hold these defendants liable? The law which could do it must be retroactive in its effect, and that no court can permit.

The Court in the opinion says: "If there were no internal-revenue tax on distilled spirits, and Congress were "to lay a tax on the spirits which evaporated while ripening for foreign markets, or upon the natural evaporation and shrinkage from any other cause between the "distillation and exportation, then there might be strong "grounds for contending that the tax was laid on spirits "exported." That is, if the tax is laid upon the evaporation or shrinkage of an article not subject to taxation, then it would be laying a tax on exports. Now, is not this the identical case we present? Here is the distilled spirits transformed into such a subject-matter that no internal-revenue tax, or other tax, is, or can, be laid thereon during process of exportation, and here is the plaintiff trying to collect a tax for the natural evaporation and shrinkage occurring during the time and while the article is not taxed—and in the language of the opinion this is a tax on the article exported. And the Court proceeds to say that it is not a tax on the article exported because Congress has attempted to provide against it by allowing a deduction for loss by evaporation and shrinkage on the taxed article of similar kind. And that leads us to remark that this is not a right which Congress either granted or can take away—to export free of tax. And if Congress, in laying its domestic tax, has so laid it as to impose a tax on articles being exported, and has failed, either through oversight or from design, to provide for this

shrinkage, then it is the duty of the Court to say so much of the law as imposes it is void.

The Court in its opinion also says:

"If this provision" (that no tax or duty shall be laid "on any article exported from any State) "is to be con- "strued as if it was a prohibitory statute, that tax would "certainly not be one laid on any article exported from "this country, as it is admitted that this one thousand and "sixty-five gallons of distilled spirits never left the State "of Kentucky."

This tax is not laid on the 1,065 gallons which evaporated and did not leave the State of Kentucky, but is a tax laid on the residue that did leave the State of Kentucky and was exported to Bremen, Germany, and if the Government has a right to collect it, it had a lien on the spirits exported therefor and could have held them until it was paid; consequently, so much must be paid as a tax on what did go out, whether it is collected by distraint of the spirits while in process of exportation or afterwards by suit on the bond.

The Court further says, after an elaborate argument and citation of authorities to sustain its position, that the spirits at the time the leakage and evaporation occurred were not in course of exportation, and as if not satisfied with its own conclusions on this subject says that the question as to the time exportation commences does not arise in this case because the spirits had not left the distillery warehouse before the leakage and evaporation took place, thus indicating that the Court would hold that exportation could only commence with transportation from the distillery warehouse and not from the execution and delivery of the bond, stamping, branding, and separating the articles which must precede the transportation, as de-

cided by the plaintiff's Treasury Department and the Attorney-General.

We had thought that this question was no longer an open one, but if in this we should be mistaken we will examine very briefly the authorities cited by the Court. It is well to remark just here that the exportation which was being discussed in the case of Coe *v.* Errol (117 U. S. R. 524) was not of the character or kind which arises in this case. That was the ordinary exportation of an article not taxed and to which the ordinary rules of law would apply, and that is, that exportation commences with transportation, with the severance of the thing from the mass of things here and addition of the thing to things elsewhere, but this is a statutory exportation of an article upon which, except for its exportation, a domestic tax would be laid. The statutes and the rules and regulations of plaintiff's Treasury Department made in pursuance thereof prescribe the time, the mode, and manner in which this exportation shall take place and it is never in the possession or control of the owners; therefore, in considering it and the rules of law applicable to it for the purpose of determining the time it commenced, this important distinction should be kept constantly in mind, and also that the defendant in the matter of this exportation could not act independently, but was subject to such control. It therefore follows, if in the course of this statutory exportation, anything had to be done by defendant as a part and parcel of the contemplated exportation in order to comply with the rules and regulations, and this act preceded the commencement of transportation, then that this necessary act was the inception or commencement of exportation just as transportation would be in the ordinary case. There was a severance of the spirits from all other spirits upon which a domestic tax was imposed by stamp-

ing and branding and marking, as required by the rules and regulations. There was a full and complete settlement made between plaintiff and defendant of claims for and on account of the production, and all deficiency taxes was paid. There was then executed and delivered a new contract between the parties relative to the spirits, and if movement of the spirits was necessary to commence exportation, and distance is not the essence of the movement, they were taken from one part of the warehouse and stored to themselves in another. In Coe *v.* Errol, *sup.*, the Court says: "There must be a time when they cease to be gov- "erned exclusively by the domestic law." That point had been reached, for they were no longer held for a domestic tax. They passed partially from the control of the Internal Revenue Department and became subject to the Customs Department, and were reported by the storekeeper as in process of exportation. So this case does not conflict with our position, nor does the case of Turpin *v.* Burges, which is a mere restatement of the priniciples of Coe *v.* Errol. Nor does the case of Pace *v.* Burgess. The question was, whether the stamp tax of twenty-five cents on a package was a tax on an article exported, and the Court said, because the Government had to be at some expense to enforce its laws and Congress had fixed that sum as the amount of such expense, they did not consider it so excessive as to call for intervention of the Court as an attempt to collect a tax under guise of doing something else. That case is good authority for us.

If this question, then, was presented now for the first time and had not already been determined by the Department and Attorney-General, the Court should be constrained to decide that exportation under these rules and regulations commenced with the execution and acceptance of the bond, and that this tax is one which is laid upon

the spirits while in process of such exportation, and therefore void.

We will only add upon the fourth paragraph, which rests tirely upon the correctness of Attorney-General Garland's opinion "that the bond is forfeited by a failure to deliver "in seven months," that such position is abandoned by the plaintiff in the action. The bond was to deliver the whole of the spirits named; if, then, a part only was delivered, a forfeiture would occur. If forfeiture occurs, the whole penalty of the bond must be paid. It is the very essence of a forfeiture, which is a penalty that no apportionment can be had. The plaintiff is entitled to collect the whole penalty or nothing. Now, if the plaintiff had sued for the whole penalty on this bond because its condition had been broken by the failure to deliver the 1,065 gallons which had evaporated, would the Court have adjudged the forfeiture and exacted the penalty, or would it have treated the bond as a contract to be liquidated in such damages as plaintiff sustained, not exceeding the amount named in the bond? Plaintiff admits this by the action brought. But the Court seems to make some distinction between a forfeiture of the bond and the forfeiture of the right to export, and says that it was a forfeiture of the right to export. This can not be; there can be no such thing as a forfeiture of the right to export; and if there could, no such thing could occur and the bond be valid. The bond guarantees the right to export free of tax, and while the bond stands the right remains.

Wherefore a reversal is respectfully asked.

PHIL B. THOMPSON, JR.,
for Appellants.

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Supreme Court of the United States.

OCTOBER TERM, 1891.

JOHN B. THOMPSON ET AL.,
vs.
THE UNITED STATES.
No. 124.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KENTUCKY.

BRIEF FOR THE UNITED STATES.

WM. A. MAURY,
Assistant Attorney-General.

Supreme Court of the United States.

OCTOBER TERM, 1891.

JOHN B. THOMPSON ET AL., *vs.* THE UNITED STATES. } No. 124.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KENTUCKY.

BRIEF FOR THE UNITED STATES.

This is an action brought in the United States district court for the district of Kentucky on a distiller's export bond, dated October 23, 1885, conditioned for the delivery of 929 packages of distilled spirits to the collector of customs of New York within fifteen days from the date of the bond, and for the exportation of said packages "in accordance with the internal-revenue laws and the regulations of the Treasury Department made in pursuance thereof immediately on the arrival of said merchandise at said port of New York," and for the production within fifteen days thereafter to the collector of internal revenue

for the eighth district of the State of Kentucky the certificate of the collector of customs of New York that the said merchandise has been duly exported, and for the production within nine months thereafter of the certificate of the collector of customs of the port of New York that the said merchandise has been duly landed in Bremen or at some other port without the jurisdiction of the United States, etc.

The breach of the condition of the bond laid in the petition (pp. 1–3), is that the defendants failed to deliver to the collector of New York within fifteen days, or within any other time, 1,065 gallons of the said merchandise, as fully appeared from a regauge made on October 27, 1885, and the object of the suit is to recover the tax of 90 cents a gallon on the said deficiency, being $958.50, with interest at the rate of one per cent per month, and a penalty of 5 per cent.

It further appears by the petition that the defendants executed a bond similar to the one hereinbefore described on April 8, 1885, for the exportation of 1,085 packages of distilled spirits, conditioned, however, for the delivery of said packages to the collector of customs of Newport News within seven months from the said date.

The 929 packages covered by the bond first mentioned were parcel of the said 1,085 packages.

It also appears that the deficiency of 1,065 gallons in in the said spirits represents the loss thereon by evaporation and leakage while the same were in warehouse and previous to transportation for export.

THE ANSWER.

The defendant Thompson, the principal in the bond sued on, set up the following defenses in his answer (pp. 8–16):

1. He denies the alleged debt; he denies that said 1,065 gallons of spirits were removed from the bonded warehouses, and he denies that the collector of the eighth collection district of Kentucky demanded the said tax of the defendants or any of them.

2. That the second bond of October 23, 1885, was given to meet the requirements of certain rules and regulations of the Treasury Department, and that at the time the bond of April 8, 1885, was given the spirits on which it is sought to collect the tax were in the packages covered by said bond; that by the acceptance of the said bond of April 8, 1885, the spirits referred to therein were free from any obligation for taxes, "and were in due process of exportation" on and after said date to Bremen, Germany, where they have arrived; and that the tax sued for is a deficiency tax upon the spirits covered by the bond of October 23, 1885, which were actually exported, and that to allow the recovery of said tax would be to enforce an export duty on the spirits exported, as aforesaid, in violation of the prohibition of the Constitution of the United States in that particular.

3. That prior to the execution and acceptance of the bond of April 8, 1885, defendant was required to make and did make a full settlement with the United States of all dues and taxes by reason of the manufacture of said

spirits, including all deficiency taxes due thereon; that all taxes not embraced in said settlement were abated, "or allowed as a credit for exportation," and, consequently, that the acceptance of the said bond and settlement were in accord and satisfaction of all taxes, dues, and demands on said spirits up to said time.

4. That the bond of April 9, 1885, constituted a contract between defendant and plaintiff as to the mode and manner of performing the act contracted about, and the liability of defendant touching the same; that defendant had paid, prior to the execution of said bond, the deficiency thus found due on regauge, and had also paid 10 cents per package for export stamp, which had been duly affixed thereon; that the packages had been properly branded, and the collector's permit had been issued directing their delivery to defendant; that under the bond in question defendant had twenty-five months and fifteen days within which to land said packages at Melbourne, Australia, and that he made contracts with third parties with a view to that end, but that by regulations made after the bond was executed it was held at the Treasury Department that unless the packages were delivered to the collector within seven months the bond would be forfeited; this, defendant says, required the execution of the bond sued on, as it was then impracticable to perform the condition of the old bond as to the requirement of delivery to the collector at Newport News; that defendant was compelled to give the new bond, the doing which caused damage to him and impaired the obligation of the original contract; and that the new bond was void because given under duress.

5. That the right to export the spirits in question was subject to no limitation of time under the Constitution or the statutes, and that the imposition of limitations upon such right by Treasury regulations was null and void, and that the bonds in question were given under the duress and compulsion of such illegal regulations.

6. That the United States was bound to know that the deficiency in the quantity of spirits must take place and that the spirits thus lost can not be made the subject of taxation.

7. That the regulations require notice before assessment of deficiency tax and that no such notice was given.

8. That the internal-revenue laws are wanting in uniformity in this, that the tax on tobacco, snuff, and fermented liquors is required to be paid when the same are withdrawn from warehouse for consumption but that the tax on distilled spirits is required to be paid within three years from the date of manufacture or entry into the bonded warehouse, wherefore it is claimed that so much of section 3293 as requires the tax on distilled spirits to be paid as aforesaid is null and void; and defendant again sets up that the bonds in question were given under the duress of this void law and the regulations framed under it.

DEMURRER.

The United States demurred to each paragraph of the petition (p. 17).

JUDGMENT ON DEMURRER.

The demurrer was sustained as to all the paragraphs of the action except the first (p. 17).

TRIAL, VERDICT, AND JUDGMENT.

There was a trial of the issue joined under the first paragraph of the answer, resulting in a verdict and judgment for the full amount claimed by the United States. (pp. 24, 25).

No bill of exceptions was taken on the trial.

WRIT OF ERROR FROM CIRCUIT COURT.

A writ of error was sued out of the circuit court (pp. 26, 27) resulting in an affirmance of the judgment of the district court (pp. 30, 31).

ARGUMENT.

Owing to the great delay of the plaintiffs in error in printing the record, it has been impracticable for the counsel for the Government to prepare a full brief. Indeed we have not the advantage at this writing of having before us the brief for the plaintiffs in error.

But we may safely rely on the able opinion of the learned judge of the district court which is given in the record (pp. 17–24), with the remark that the learned circuit judge, in affirming the judgment of the district court, also contented himself with a reference to the full and able opinion of the district judge (p. 31).

It is respectfully submitted that there is no error in the record.

WM. A. MAURY,
Assistant Attorney-General.

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SUPPLEMENTAL BRIEF FOR THE UNITED STATES.

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SUPPLEMENTAL BRIEF FOR THE UNITED STATES.

In the determination of the claim of exemption from taxation on the outage in the spirits which occurred in the interval marked by the dates of the two bonds given in the record, it is an important consideration that Congress has said in very plain terms that the Government's right to the tax laid by the internal-revenue law on distilled spirits has accrued so soon as they have come into being.

Section 3248, Revised Statutes, provides that—

> Distilled spirits, spirits, alcohol, and alcoholic spirit, within the true intent and meaning of this act, is that substance known as ethyl alcohol, hydrated oxide of ethyl, or spirit of wine, which is commonly produced by the fermentation of grain, starch, molasses, or sugar, including all dilutions and mixtures of this substance; and the tax shall attach to this substance as soon as it is in existence as such, whether it be subsequently separated as pure or impure spirit, or be immediately, or at any subsequent time, transferred into any other substance, either in the process of original production or by any subsequent process.

Section 3257, Revised Statutes, provides that—

There shall be levied and collected on all distilled spirits on which the tax prescribed by law has not been paid, a tax of seventy cents on each proof-gallon, to be paid by the distiller, owner, or person having possession thereof before removal from the distillery warehouse: *Provided*, That distilled spirits lawfully deposited in a distillery bonded warehouse prior to the first day of August, eighteen hundred and seventy-two, may be withdrawn on payment of the taxes thereon at the rate, within the time, and in the manner provided by law at the time of such deposit. The tax on such spirits shall be collected on the whole number of gauge or wine gallons when below proof, and shall be increased in proportion for any greater strength than the strength of proof spirit, as defined in this title; and any fractional part of a gallon amounting to one-half gallon or over in a cask or package shall be taxed as a gallon, and any fractional part of a gallon less than one-half gallon in any cask or package shall be exempt from tax. Every proprietor or possessor of, and every person in any manner interested in the use of, any still, distillery, or distilling apparatus, shall be jointly and severally liable for the taxes imposed by law on the distilled spirits produced therefrom, and the tax shall be a first lien on the spirits distilled, the distillery used for distilling the same, the stills, vessels, fixtures, and tools therein, the lot or tract of land whereon the said distillery is situated, and on any building thereon from the time said spirits are in existence as such until the said tax is paid.

[SEC. 3251 *a*.] *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That from and after the passage of this act there shall be levied and collected on all distilled spirits thereafter produced in the United States, a tax of ninety cents on each proof gallon, or wine-gallon when below proof, to be paid by the distiller, owner, or person having possession thereof, before removal from the distillery bonded warehouse; and so much of section three thousand two hundred and fifty-one of the Revised Statutes of the United States as is inconsistent herewith is hereby repealed.

Section 3293, Revised Statutes, provides as follows:

The distiller or owner of all spirits removed as aforesaid to the distillery warehouse shall, on the first day of each month, or within five days thereafter, enter the same for deposit in such warehouse, under such regulations as the Commisioner of Internal Revenue may prescribe. Said entry shall be in triplicate, and shall contain the name of the person making the entry, the designation of the warehouse in which the deposit is made, and the date thereof, and shall be in the following form:

Entry for deposit in distillery warehouse.

Entry of distilled sprits deposited by ——— ———, in distillery warehouse ———, in the ——— district, State of ———, *during the month ending* on the —— day of ———, anno Domini ——.

And the entry shall specify the kind of spirits, the whole number of casks, the marks and serial numbers thereon, the number of gauge or

wine gallons *proof gallons and taxable gallons*, and the amount of the tax on the spirits contained in them; all of which shall be verified by the oath of the distiller or owner of the same attached to the entry. The said distiller or owner shall *at the time of making said entry* give his bond in duplicate, with one or more sureties, satisfactory to the collector of the district, conditioned that the principal named in said bond shall pay the tax on the spirits as specified in the entry, or cause the same to be paid, before removal from said distillery warehouse, and within one year* from the date of said *entry;* and the penal sum of such bond shall not be less than double the amount of the tax on such distilled spirits. One of said entries shall be retained in the office of the collector of the district, one sent to the storekeeper in charge of the warehouse, to be retained and filed in the warehouse, and one sent with duplicate of the bond to the Commissioner of Internal Revenue, to be filed in his office.

A new bond shall be required in case of the death, insolvency, or removal of either of the sureties, and may be required in any other contingency affecting its validity or impairing its efficiency, at the discretion of the Commissioner of Internal Revenue. And in case the distiller or owner fails or refuses to give the bond hereinbefore required, or to renew the same, or neglects to immediately withdraw the spirits and pay the tax thereon, or if he neglects to withdraw any bonded spirits and pay the tax thereon before the expiration of the time limited in the bond, the collector shall proceed to collect the tax by distraint, issuing his warrant of distraint for the amount of tax found to be due, as ascertained by him from the report of the gauger if no bond was given, or from the terms of the bond if a bond was given. But this provision shall not exclude any other remedy or proceeding provided by law.

If it shall appear at any time that there has been a loss of distilled spirits from any cask or other package hereafter deposited in a distillery warehouse, other than the loss provided for in section three thousand two hundred and twenty-one of the Revised Statutes of the United States, which, in the opinion of the Commissioner of Internal Revenue, is excessive, he may instruct the collector of the district in which the loss has occurred to require the withdrawal from warehouse of such spirits, and to collect the tax accrued upon the original quantity of distilled spirits entered into the warehouse in such cask or package, together with the interest accrued thereon, if any, notwithstanding that the time specified in any bond given for the withdrawal of the spirits entered into warehouse in such cask or package has not expired. If the said tax and interest are not paid on demand, the collector shall report the amount due upon his next monthly list, and it shall be assessed and collected as other taxes are assessed and collected.

These provisions of law are referred to by the learned district judge (p. 19) in support of the proposition above advanced.

*Joint Resolution of March 28, 1878, changes this period to three years, and contains other provisions cognate to this section. (See 20 Stats., 249.)

But Congress has also provided that distilled spirits entered for exportation before payment of the tax shall be exempt from the tax, if exported in conformity to the law and the regulations under it, and that spirits on which the tax has been paid shall be allowed a drawback of the tax on exportation.

The spirits covered by the bond in suit, being in the distiller Thompson's own warehouse, were part of a lot of spirits entered for exportation to Melbourne, Australia, on April 8, 1885, and to cover which the exportation bond of that date was given (pp. 3, 4).

But, instead of being exported, the spirits were kept in warehouse until the period of seven months named in the condition of the bond as the period for accomplishing transportation to the port of export had nearly expired, and until, as is alleged, it was too late to make the exportation through the port of Newport News, Va., without a breach of said condition.

Thereupon the distiller, Thompson, determined to export some of the packages of spirits through the port of New York to Bremen, and accordingly these packages were again entered for exportation and the second exportation bond, dated October 23, 1885, was executed and the exportation took place under that bond.

When the entry for exportation was made and the first bond given, the spirits were regauged in obedience to the requirements of section 17 of the act of May 28, 1880 (21 Stat., 145), which provides as follows:

> Whenever the owner of any distilled spirits shall desire to withdraw the same from the distillery warehouse, or from a special bonded warehouse, he may file with the collector a notice giving a description of the

packages to be withdrawn, and request that the distilled spirits be regauged; and thereupon the collector shall direct the gauger to regauge the same, and mark upon each package so regauged the number of gauge or wine gallons and proof-gallons therein contained. If upon such regauging it shall appear that there has been a loss of distilled spirits from any cask or package, without the fault or negligence of the distiller or owner thereof, taxes shall be collected only on the quantity of distilled spir[i]ts contained in such cask or package at the time of the withdrawal thereof from the distillery warehouse, or special bonded warehouse: *Provided, however*, That the allowance which shall be made for such loss of spirits as aforesaid shall not exceed one proof-gallon for two months, or part thereof, one and one-half gallons for three and four months, two gallons for five and six months, two and one-half gallons for seven and eight months, three gallons for nine and ten months, three and one-half gallons for eleven and twelve months, four gallons for thirteen, fourteen, and fifteen months, four and one-half gallons for sixteen, seventeen, and eighteen months, five gallons for nineteen, twenty, and twenty-one months, five and one-half gallons for twenty-two, twenty-three, and twenty-four months, six gallons for twenty-five, twenty-six, and twenty-seven months, six and one-half gallons for twenty-eight, twenty-nine, and thirty months, seven gallons for thirty-one, thirty-two, and thirty-three months, and seven and one-half gallons for thirty-four, thirty-five, and thirty-six months: *Provided, also*, That the foregoing allowance of loss shall apply only to casks or packages of a capacity of forty or more wine-gallons, and that the allowance for loss on casks or packages of less capacity than forty gallons shall not exceed one-half the amount allowed on said forty-gallon cask or package; but no allowance shall be made on casks or packages of less capacity than twenty gallons: *And provided further*, That the proof of such distilled spirits shall not in any case be computed at the time of withdrawal at less than one hundred per cent.

Under this provision of law the allowance for outage was then duly made. But the law contemplated that when a withdrawal entry of any kind was made the spirits covered by the entry would be withdrawn.

The fact, therefore, is that in consequence of the delay of the distiller in this case it became impossible for him as he alleges to export the spirits under the first entry, and it became necessary for him to make a new entry for exportation of any part of the spirits he wished to export and give a new bond, which the statute, as we interpret it, required should be accompanied by a regauge, through which the outage, on which the tax sued for is claimed,

was made to appear. Without such regauge, whether the distiller asked for it or not, the interests of the Government could not be protected. The law contemplating but one withdrawal entry, and providing only for an allowance for outage on such entry, it was the duty of the collector to assess a tax on the outage that occurred between the dates of the two bonds, because that outage represented spirits that could not be exported that were within no exemption, and which must, therefore, pay the tax. Certainly the exporter of spirits has no equitable right to have his exemption from the tax extended any further *than the spirits he actually exports.*

It was impossible to expand the law to suit the particular circumstances of this case, and, in that way, remove from taxation property that was plainly assessable with the tax under the law.

The only exemption that could possibly apply to the spirits covered by the second entry was that provided for by the first section of the act of December 20, 1879 (21 Stat., 59), which provides—

> That where spirits are withdrawn from distillery warehouses for exportation according to law, it shall be lawful, under such rules and regulations and limitations as shall be prescribed by the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, for an allowance to be made for leakage or loss by any unavoidable accident, and without any fraud or negligence of the distiller, owner, exporter, carrier, or their agents or employees, *occurring during transportation from a distillery warehouse to the port of export;* nor shall any assessment be collected for such loss or leakage where the same has not been paid on distilled spirits exported since the first day of May, eighteen hundred and seventy-eight.

To prevent the possibility of the revenue suffering by any loose interpretation of the law allowing a drawback of the tax paid on spirits about to be exported, section 3329, Revised Statutes, as amended by section 10 of the act of

May 28, 1880 (21 Stat., 145), provides that the packages of spirits shall be regauged as they lie alongside the vessel or in it, and that a drawback of 90 cents per proof gallon, "*as per last gauge of said spirits prior to exportation*," shall be allowed; thus plainly showing that it was the intention of Congress that so much of the tax as represented outage prior to the last gauge should be excluded from the allowance of drawback. It is a bad rule that does not work both ways, and we do not see why the Government should exempt outage in the case of exportation without payment of the tax and tax it in the case of drawback on exportation after payment of the tax.

It is to be remembered, that under the law prior to the act of May 28, 1880 (*supra*), the distiller was assessed with the tax on all the outage, and the act of 1880, just referred to, being in derogation of the previous law and operating against the Government, should, we submit, be construed with strictness, so as not to extend after-made exemptions from the tax any further than the language of such exemptions properly requires.

It is very suggestive that the act of June 9, 1874 (18 Stat, 64), as amended by section 10 of the act of March 1, 1879 (20 Stat., 327), requires as a condition of the cancellation of the transportation bond therein provided for that the "*tax on deficiency*" shall be paid.

To this we would add that by a regulation (No. 296) dated September 23, 1885, and approved by the Commissioner of Internal Revenue and the Secretary of the Treasury, it is expressly required that the tax shall be paid on the taxable gallons represented by the amount of any additional outage noted by the gauger on his report accom-